

CASES

SELECTED FROM THOSE

HEARD AND DETERMINED IN THE VICE-ADMIRALTY COURT

FOR

LOWER CANADA.

RELATING CHIEFLY TO THE

Jurisdiction and Practice of the Court,

OR INVOLVING

Questions of Maritime Law

OF FREQUENT OCCURRENCE IN THE TRADE AND NAVIGATION
OF THE RIVER AND GULF OF ST. LAWRENCE.

PRECEDED BY

THE RULES AND REGULATIONS ESTABLISHED UNDER THE
AUTHORITY OF THE IMPERIAL PARLIAMENT.

WITH

AN APPENDIX

CONTAINING THE ORIGINAL COMMISSION CONSTITUTING THE COURT,
AND OTHER DOCUMENTS RELATING TO THE SAME.

EDITED BY

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PREFACE.

SHORTLY after the Treaty of Paris of the 10th of February, 1763, by which Canada was ceded by the Crown of France to that of Great Britain, His Majesty King George the Third issued a Commission under the Great Seal of the High Court of Admiralty of England, establishing a Court of Vice-Admiralty for the province of Quebec (now called the province of Canada), to have jurisdiction therein according to the civil and maritime laws, and ancient customs of His Majesty's High Court of Admiralty; and this Court, as will appear by the documents in the Appendix, has been continued by repeated Commissions down to the present time, so far as Lower Canada is concerned.

The records of the Court up to the time of the passing of the Imperial Act, 2 Will. 4, c. 51, to regulate the practice in the Vice-Admiralty Courts, and to obviate doubts as to their jurisdiction, afford little

information as to the extent and nature of the cases brought before it, or of the principles of jurisprudence established by them. Many important revenue cases were decided by the Court, in the time of Mr. Kerr, of which it is to be regretted that no reports exist. Two interesting judgments of that gentleman will be found in the Appendix.

Since the Court was established the trade by the St. Lawrence has increased from an average yearly tonnage of 5496 tons to that of 618,926 tons; and its growing importance, and the belief that this must render the jurisprudence and practice of the Court an object of interest, as well to the profession as to those engaged in the commerce and navigation of the river and gulf, has been the motive which has led to the publication of the present volume.

LONDON,

8th March, 1858.

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RULES AND REGULATIONS

Made in Pursuance of an Act of Parliament passed in the Second Year of the Reign of His Majesty, King William the Fourth, touching the Practice to be observed in Suits and Proceedings in the several Courts of Vice-Admiralty abroad, and established by the King's Order in Council.

WHEREAS by an Act passed in the Second Year of His present Majesty King William IV., entitled "An Act to regulate the Practice and the Fees in the Vice-Admiralty Courts abroad," &c., His Majesty is empowered to make such Rules, Regulations, and Fees, and to alter them from time to time, as may be found expedient, in the Vice-Admiralty Courts abroad; and whereas, by an Order in Council of the 23rd of June, 1832, His Majesty has been pleased to authorize us to carry into effect the following Rules, Regulations, and Tables of Fees, to be taken and received by the respective Officers of the said Courts, We send you herewith a Book containing Copy of the aforesaid Act, Order in Council, Table of Fees, and the Regulations of Practice to be observed in the Vice-Admiralty Court under your jurisdiction; and hereby desire and direct, that the Judge, Officers, and Prac-

RULES AND REGULATIONS.

titioners in the said Court be governed by the same accordingly.

J. R. G. GRAHAM,
T. M. HARDY,
G. H. L. DUNDAS,
S. JOHN BROOKE PETCHELL,
G. BARRINGTON,
H. LABOUCHERE.

*To the Vice-Admiral, and the respective
Officers and Practitioners of the Vice-
Admiralty Court of Quebec.*

By Command of their Lordships,
JOHN BARROW.

ANNO SECUNDO GULIELMI IV. REGIS.

CAP. LI.

An Act to regulate the Practice and the Fees in the Vice-Admiralty Courts abroad, and to obviate Doubts as to their Jurisdiction.—23d June, 1832.

WHEREAS it is expedient that provision should be made for the regulation of the practice to be observed in the suits and proceedings in the Courts of Vice-Admiralty in His Majesty's possessions abroad, and for the establishment of fees to be allowed and taken in the said Courts by the respective judges, officers, and practitioners therein: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall be lawful for His Majesty, with the advice of

His Majesty
empowered to
make regula-
tions and es-
tablish fees in
the Vice-Admi-
ralty Courts
abroad.

his Privy Council, from time to time to make and ordain such rules and regulations as shall be deemed expedient touching the practice to be observed in suits and proceedings in the several Courts of Vice-Admiralty at present or hereafter to be established in any of His Majesty's possessions abroad; and likewise from time to time to make, ordain, and establish tables of fees to be taken or received by the judges, officers, and practitioners in the said Courts, for all acts to be done therein; and also from time to time, as shall be found expedient, to alter any such rules, regulations, and fees, and to make any new regulations and table or tables of fees; and that all such rules, regulations, and fees, after the same shall have been so made and established or altered, from time to time, be entered or enrolled in the public books or records of the said Courts, so far as such practice and fees shall relate or apply to each of such Courts respectively.

Regulations and fees to be enrolled in the respective Courts.

II. And be it further enacted, that a copy of every table of fees so to be from time to time made and established or altered, shall be laid before the House of Commons within three calendar months next after the making and establishment or alteration thereof respectively, if Parliament shall be then sitting, and if not, then within one calendar month next after the subsequent meeting of Parliament.

The tables of fees to be laid before the House of Commons.

III. And be it further enacted, that the several fees so to be established, and no other, shall, from and after the making and establishment thereof, and the entry and enrolment thereof as aforesaid, be deemed and taken to be the lawful fees of the several judges, officers, ministers, and practitioners of the said respective Courts; and such fees only shall and may be demanded, received and taken accordingly.

Fees so established to be the only lawful fees.

IV. And to the intent that all such regulations and fees may be promulgated and publicly made known, be it

Copies of the regulations & tables of fees to be hung up in each Court.

further enacted, that the judge and registrar of every such Court shall cause to be kept constantly hung up and preserved in some conspicuous part of every such Court, and in the office of the registrar, a copy of the table of fees so to be from time to time ordained and established in such Courts respectively, so that the said table may be seen and read by all persons having any business in any such Court and office respectively; and that the books or records containing the entries of the said regulations and tables of fees, as the same shall be in force, shall be at all seasonable times open to the inspection of the practitioners and suitors in every such Court.

Appeal to the
High Court of
Admiralty in
cases of costs.

V. And be it further enacted, that in all cases in which proceedings may be had in any of the said Vice-Admiralty Courts, if any person shall feel himself aggrieved by the charges made by any of the officers or practitioners therein, and the allowance thereof by such Vice-Admiralty Court, by reason that such charges are not warranted by the tables herein-before mentioned, it shall be lawful for such person or his agent, under the regulations to be established in pursuance of the powers given by this Act, by summary application to the High Court of Admiralty to have the said charges taxed by the authority thereof.

Vice-Admi-
ralty Courts to
have jurisdic-
tion in certain
maritime
causes.

VI. And whereas in certain cases doubts may arise as to the jurisdiction of Vice-Admiralty Courts in His Majesty's possessions abroad, with respect to suits for seamen's wages, pilotage, bottomry, damage to a ship by collision, contempt in breach of the regulations and instructions relating to His Majesty's service at sea, salvage, and droits of Admiralty; be it therefore enacted, that in all cases where a ship or vessel, or the master thereof, shall come within the local limits of any Vice-Admiralty Court, it shall be lawful for any person to commence proceedings in any of the suits herein-before mentioned in such Vice-Admiralty Court, notwithstanding the cause of action may have arisen out of the local limits of such

Court, and to carry on the same in the same manner as if the cause of action had arisen within the said limits.

ACT 3 & 4 WILLIAM IV.

CAP. XLI.

An Act for the Better Administration of Justice in His Majesty's Privy Council.

II. And be it further enacted, that from and after the first day of June, 1833, all appeals or applications in prize suits, and in all other suits or proceedings in the Courts of Admiralty, or Vice-Admiralty Courts, or any other Court in the plantations in America, and other His Majesty's dominions or elsewhere abroad, which may now, by virtue of any law, statute, commission or usage, be made to the High Court of Admiralty in England, or to the Lords Commissioners in prize cases, shall be made to His Majesty in Council, and not to the said High Court of Admiralty in England, or to such Commissioners as aforesaid; and such appeals shall be made in the same manner and form, and within such time wherein such appeals might, if this Act had not been passed, have been made to the said High Court of Admiralty, or to the Lords Commissioners in prize cases respectively; and that all laws or statutes now in force with respect to any such appeals or applications shall apply to any appeals to be made in pursuance of this Act to His Majesty in Council.

AT THE COURT OF ST. JAMES'S, THE 27TH DAY OF JUNE,
1832, PRESENT THE KING'S MOST EXCELLENT
MAJESTY IN COUNCIL.

WHEREAS, there was this day read at the Board a Memorial from the Right Honourable the Lords Commissioners of the Admiralty, dated the 19th instant, in the words following, viz. :

“Whereas by an Act passed in the second year of Your Majesty's reign for the regulation of the practice to be observed in the Suits and Proceedings in the Courts of Vice-Admiralty in your Majesty's Possessions abroad, and for the establishment of Fees to be allowed and taken in the said Courts by the respective Judges, Officers, and Practitioners therein, it is enacted that it shall be lawful for Your Majesty, with the advice of Your Privy Council, from time to time to make and ordain such Rules and Regulations as shall be deemed expedient, touching the practice to be observed in Suits and Proceedings in the several Courts of Vice-Admiralty, at present or hereafter to be established in any of Your Majesty's Possessions abroad ; and likewise, from time to time, to make, ordain, and establish Tables of Fees to be taken or received by the Judges, Officers, and Practitioners in the said Courts, for all acts to be done therein ; and also, from time to time as shall be found expedient, to alter any such Rules, Regulations, and Fees, and to make any new Regulations, and Table or Tables of Fees ; and that all such Rules, Regulations, and Fees, after the same shall have been so made and established or altered, shall, from time to time, be entered or enrolled in the public Books or Records of the said Courts, so far as such Practice and

Fees shall relate or apply to each of such Courts respectively.

“And whereas among other provisions of the said Act it is ordained, with respect to doubts that may arise as to the jurisdiction of Vice-Admiralty Courts in His Majesty's Possessions abroad, or to Suits for Seamen's Wages, Pilotage, Bottomry, Damage to a Ship by collision, Contempt in breach of the Regulations and Instructions relating to His Majesty's Service at sea, Salvage and Droits of Admiralty, that in all cases where a Ship or Vessel, or the Master thereof shall come within the local limits of any Vice-Admiralty Court, it shall be lawful for any person to commence proceedings in any of the suits before-mentioned in such Vice-Admiralty Court, and to carry on the same in the same manner as if the cause of action had arisen within the said limits.

“And whereas we deem it of great importance that one uniform system of practice should prevail in all the Vice-Admiralty Courts in Your Majesty's Colonies, we would most humbly submit to Your Majesty that Your Majesty will be pleased by Your Order in Council to authorize us to carry into effect the said Rules and Regulations touching the practice in Suits and Proceedings in the said Courts, as laid down in a Report of certain Referees appointed by the Lords Commissioners of Your Majesty's Treasury, and approved by the Judge and other competent Law Authorities of the High Court of Admiralty of England; and also that the Tables of Fees proposed and approved by the said Authorities may be established by Your Majesty's Order in Council, as the only Fees to be taken and received by the Judges, Registrars, Marshals, Advocates, and Proctors of the Vice-Admiralty Courts of the respective Colonies, as laid down by the Referees, and approved by the Law Authorities above-mentioned.

“And further, that we be authorized to carry into

execution all other provisions contained and set forth in the Act of Parliament aforesaid."

His Majesty having taken the said memorial into consideration, was pleased, by and with the advice of His Privy Council, to approve of what is therein proposed ; and the Right Honourable the Lords Commissioners of the Admiralty are to give the necessary directions therein accordingly.

W. L. BATHURST.

RULES AND REGULATIONS

TO BE OBSERVED IN THE SEVERAL

COURTS OF VICE-ADMIRALTY.

§ 1. As to the holding of Courts.—§ 2. Surrogates.—§ 3. Registrar and Marshal to be sworn.—§ 4. Registry Office.—§ 5. Registrar's Duties.—§ 6. Marshal's Duties.—§ 7. Proceedings by Action.—§ 8. Execution of Warrants.—§ 9. Appearance and Bail.—§ 10. Proceeding by Default.—§ 11. Contested Suits.—§ 12. Proceedings by Plea and Proof.—§ 13. Examination of Witnesses.—§ 14. Proceeding by Act on Petition.—§ 15. Suits for Mariner's Wages.—§ 16. Suits for Pilotage.—§ 17. Suits for Bottomry.—§ 18. Causes of Damage by Collision.—§ 19. Suits for Salvage.—§ 20. Causes of Possession.—§ 21. Action to obtain Security for the safe Return of a Vessel.—§ 22. Derelict Cases.—Sections 23, 24, 25, and 26, relating to Pirates, have been omitted.—§ 27. Prosecutions for breach of the Revenue or Navigation Laws.—§ 28. General Rules to be observed in Practice.—§ 29. Tender.—§ 30. References.—§ 31. Taxation of Costs.—§ 32. Incidental Monitions.—§ 33. Commissions.—§ 34. Acts on Petition.—§ 35. Appeals.—§ 36. Regulations as to theittings of the Court.—§ 37. As to the Return and Service of Warrants, Monitions, and other Instruments.—§ 38. Interlocutory Decree.—§ 39. Monitions.—§ 40. Proxies.—§ 41. Other General Rules.

§ 1. *As to the holding of Courts.*

COURTS are to be regularly held at short intervals by adjournment from day to day; but the Judge is authorized to sit on any intermediate day as hereinafter provided, in case the despatch of business, or other necessity shall require. The practice which has prevailed in many of the Vice-Admiralty Courts of presenting a petition to the Judge to appoint a day for holding a Court is from henceforth to cease.

The Judge is to be at convenient times accessible at

his chambers, that he may be, if necessary, consulted by the Registrar on any incidental matter, or for the purpose of hearing a motion by council, or directing the sale of perishable goods, or doing any other act which the emergency of a case may render requisite to be done.

§ 2. *Surrogates.*

The admitted advocates of each Court are to be appointed Surrogates, to do, in the absence of the Judge, ordinary, or common form acts (but none other), such as the administering an oath to a witness, decreeing a monition, taking bail, and the like; but in those Courts in which the advocate is allowed to act as proctor also, no judicial act of any kind is to be performed by a practitioner in any cause in which he may be professionally retained or interested.

When an advocate is to be admitted a Surrogate, he is to attend with the Registrar before the Judge, and, on being sworn faithfully to execute his office, is to be admitted. The Registrar is then to make an entry of such admission in the Minute or Assignment Book, and attest the same.

§ 3. *Registrar and Marshal to be sworn.*

The persons to be appointed to execute the several offices of Registrar and Marshal are to be sworn faithfully to perform their respective duties.

§ 4. *Registry Office.*

The Registry of the Court is to be accessible to suitors at convenient hours in the day throughout the year; and a person of competent skill and knowledge is to be in regular attendance there, for all requisite purposes.

§ 5. Registrar's Duties.

The duty of the Registrar is to attend all sittings of the Court, and also before the Judge, or Surrogate in chambers, and to make minutes of every act of Court or decree, and to enter the same in an Assignment Book, to be kept for the purpose, which is to form a record of the proceedings of the Court; he is to file, or take the custody of all pleas, depositions, documents, exhibits, and papers brought into Court, recording the receipt thereof in the Assignment Book, briefly stating the papers so received, and the date of their receipt. He is to take the depositions of all witnesses examined upon pleas and interrogatories. If from illness, or any other sufficient cause, he should be unable to perform this duty, he may, with the consent of the Judge, appoint some other competent person to act for him on those occasions. He is to make, or procure to be made, translations of such documents in foreign languages brought into Court as may be required by the Judge, or by the proctor of either party. He is to make and to attest copies of all records, documents, and papers that may be requisite. He is to draw all bail-bonds, or recognizances, and to be present at and attest the execution thereof before the Judge or Surrogate. He is to prepare, sign, and seal all warrants, commissions, and instruments issuing under the seal of the Court. He is also to collect from the practitioners, and receive for the Judge's use, the fees payable to him. He is to have the custody of all monies paid into Court, and to remit them when required, by bills of exchange or other valid securities, to England. He is prohibited from acting either as advocate or proctor in any suit, matter, or proceeding in the Court of which he is a Registrar.

§ 6. *Marshal's Duties.*

The Marshal is to attend the Judge in Court on all court-days. He is to enquire and report as to the sufficiency of persons proposed for bail. He is to execute all such warrants, decrees, monitions, and other instruments as shall be issued from the Court, and be directed to him; and he is to make due returns thereof.

In cases where, in order to avoid expense, it may be deemed requisite to employ others than the Marshal to execute the process at any great distance from the Court, the instrument is to be addressed as follows:—

“To all and singular Mayors, Justices of the Peace, Bailiffs, Constables, Officers, and Ministers of Justice, or literate persons whomsoever, and more especially to the Collector and Comptroller of our Customs at the port of —;” or in some similar form, if more appropriate to the existing authorities in the colony.

And on those occasions either the Collector or Comptroller of the Customs is to be preferred, unless they are parties to, or interested in, the suit.

And with the same view of avoiding expense, it is expedient that other duties which properly belong to the office of Marshal, and which require to be performed at a distance from the Court, be executed by others; in which cases, commissions are to be addressed specially to any competent persons, by name, resident near the place where such duties are to be performed.

§ 7. *Proceedings by Action.*

These are to commence with an entry by a proctor, in a book to be kept in the Registry for that purpose, called the Action Book, of the action in a given sum sufficient to cover the demand and the probable amount of costs; but this sum is on no account to be excessive.

Before any warrant is issued, the party applying for the same is to exhibit to the Registrar an affidavit, setting forth the nature of the demand, that application for payment has been made without effect to the parties concerned, and that the aid and process of the Court are required for the enforcement thereof. Upon the leaving of this affidavit in the Registry, a warrant, specifying the amount of the action, may issue to arrest the property proceeded against, or the person in cases where personal arrest is lawful; but personal arrest is never to be resorted to when the ends of justice can be otherwise obtained. The proctor, having obtained the warrant from the Registrar, is to make a copy of it, and then deliver the warrant and copy to the Marshal, with instructions for the execution of the process. If the instrument is to be served on a ship, cargo, and freight at different places, as many different copies thereof as are requisite, must be made by the proctor for that purpose. Every copy is to be examined with the original by the Marshal, or the person serving the instrument.

§ 8. *Execution of Warrants.*

When a ship is, or a ship and cargo are, to be arrested, the warrant is to be affixed on the mainmast or some conspicuous part of the vessel for a short time, and a collated copy of it left on board; and when goods only are to be arrested (either for the purpose of proceeding against such goods or the freight due thereon), the warrant is to be affixed for a short time on part of the goods, and a collated copy thereof left thereon, or with any person in whose actual custody the goods may be.

In cases of personal arrest the warrant under the seal of the Court must be shown to the party before he is taken into custody.

A certificate of the service of every warrant executed

by the Marshal is to be endorsed thereon, and signed by him, in which he is to set forth the time when, and the mode by which the service was effected.

When a warrant is served by any other person than the Marshal, there must be, in addition to a similar certificate of the person serving it, his affidavit in the verification thereof.

The warrant having been served is to be delivered back to the proctor, to be by him returned into the Registry at the time when it purports to be returnable; and the Registrar is then to attend with the proctor before a Judge or Surrogate, and enter a minute in the Assignation Book, that the warrant has been returned duly served and executed.

§ 9. *Appearance and Bail.*

After the entry of an action, and before the issue of a warrant, the defendant may voluntarily appear and give bail, and thus avoid the expense consequent on the issue of process.

An appearance alone, without any bail, may be sufficient for the purpose of contesting a suit, but in cases of the arrest of property or of the person, either the demand must be satisfied, or competent bail given before the property or person is released from the arrest.

In order to avoid unnecessary detention when the arrest is to take place at a distance from the Court, a commission for taking bail is to accompany the warrant, as an authority to the party serving the warrant to release the individual or the property on sufficient bail being given.

§ 10. *Proceeding by Default.*

In the case of property arrested, and no party appearing after the return of the warrant, the cause may proceed by default, or *pœnam contumaciæ*. To this end, on the

day the warrant is returned, the parties cited and not appearing, are, at the petition of the proctor, to be pronounced by the Judge or Surrogate to be in default, and an entry to that effect is to be added by the Registrar to the minute on the return of the warrant in the Assignment Book.

At the expiration of two months from the return of the warrant, if no appearance be given, the parties cited are again to be pronounced in default, and the promoter is to be entitled to a decree pronouncing for the amount of his demand, and giving him a lien on the property; which decree is to be drawn by the proctor, who, after it has been perused and settled by the Registrar, is to make a fair copy of it for the Court.

An affidavit in verification of all the facts mentioned in the decree is to be made by the party proceeding, which affidavit is to be drawn by the proctor, and submitted to the Registrar.

The proctor is then to prepare a short case detailing the proceedings, which, with a copy of the affidavit, he is to deliver to counsel as instructions to move the Court to sign the decree, of which, when signed by the Judge, the Registrar is to make a minute in the Assignment Book.

On the same Court day, or on any subsequent adjourned Court day, if an affidavit of two persons is exhibited, stating that the property proceeded against is perishable and likely to deteriorate in value, the Judge is to direct a decree of appraisement and sale to issue, of which the Registrar is also to make an entry. This decree is then to be delivered by the Registrar to the proctor, and by the latter to the Marshal, with instructions for its execution. The Marshal is thereupon to select a broker, or other person conversant with the value of the property, and to administer an oath to him justly and faithfully to inventorize and appraise the ship, her

tackle, apparel, and furniture, or the goods, as the case may be. An inventory and appraisement are then to be made, and the Marshal is to cause the property to be publicly advertised by printed bills or otherwise, and, after sufficient public notice of the intended sale, to be sold by auction. The sale being completed, the Marshal is to return the decree (with his certificate as to the execution thereof) into Court, or before the Judge or Surrogate in Chambers, and to bring in at the same time the inventory and appraisement, with a more extended return of the Marshal and appraiser, signed by them, setting forth the particulars and the value of the ship or goods as appraised; and he is also to bring the account of sales and proceeds into the Registry within the time specified in the decree.

If the property be of considerable value, two brokers or appraisers may be employed, provided there is sufficient reason for the same. The property is never to be sold under the appraised value, unless by special order of the Court; and if the appraised value cannot be obtained after an attempt to sell, the Marshal is to exhibit an affidavit of at least two persons, stating that the property had been duly advertised and put up at public auction, when only a certain sum was bid for the same. And if the Judge be then satisfied that all has been done as properly and fairly as if the owner himself had been selling his own property, he is to direct the same to be sold at a reduced price, but not for less than a sum which he in his discretion is to fix. A minute of such order is to be entered by the Registrar in the Assignment Book, and the property is then to be offered again to sale by public auction.

When the proceeds are brought into the Registry, the Registrar may pay out of Court to the party proceeding, on his application for that purpose, the amount of the debt pronounced for, together with the costs of the suit,

the same being first duly taxed and allowed by the Judge.

When a decree pronouncing for the interest of a party proceeding by default has been signed by the Judge, if any other party should also proceed against the property, he will be entitled, on motion of counsel, to have his interest pronounced for by an interlocutory decree, after the warrant has been returned two months, and a second default has been incurred in his particular suit. On this occasion a similar affidavit must be exhibited to that required on obtaining the decree for the interest of the party who had originally proceeded by default.

The balance of proceeds, if any remain in the Registry after satisfying the amount pronounced for and costs, may, on production of the ship's register, or other satisfactory evidence of ownership, be paid out to the owner. But if his application be made within a year and a day from the return of the warrant, he is to give bail to answer latent demands.

The sufficiency of sureties is to be reported upon by the Marshal, and the bail must be given in the manner hereinafter mentioned respecting bail to answer an action in a contested suit.

In a case proceeding by default or *in panam*, the owners of the property are to be allowed to contest the suit at any time before the expiration of a year and a day from the return of the warrant; but if they neglect to appear until they have been pronounced in default, they must, on appearing, pay contumacy fees, viz. all the costs occasioned by such their neglect, including the charges for keeping possession beyond the time specified in the warrant for its return, which costs are to be taxed by the Court.

§ 11. *Contested Suits.*

In contested suits the property remains in the custody of the Court, but if the release thereof be a material object to the owner, or to the party defendant, it may be delivered to him on sufficient bail by two persons severally in the amount for which the action has been entered. Causes of possession, however, are not bailable unless by the special direction of the Judge. Bail to answer an action, and all bail bonds or recognizances are to be given in the following manner:

The proctor who is to produce the sureties is to furnish the Marshal and also the adverse proctor with the particulars in writing, of the names of the proposed bail, their address and occupation; and the Marshal, having made due enquiry as to their sufficiency, is to deliver his report thereon to the proctor proposing the bail, who is then to instruct the Registrar to prepare the bail-bond. The Registrar, the two proctors, and their sureties, are then to attend the Judge or Surrogate, and, upon the recognizances being duly entered into, the property is to be released upon an instrument to be drawn by the Marshal and issued immediately after bail has been given. This form is to be dispensed with when the bail is taken by commission.

It is competent to the adverse proctor to object to the proposed sureties, in which case the Judge is immediately to decide on the validity of the objections. If the adverse proctor do not attend at the production of the sureties, the bail may be taken *ex parte* upon an affidavit, to be prepared by the proctor producing them, that he has given twenty-four hours' notice in writing of their names, address, and occupation (a), which affidavit is to be left in the Registry.

(a) See Supplementary Rules, of 2nd March, 1848.

Should a party appear under protest, either objecting to the jurisdiction of the Court or on any other ground on which he means to contend that he is not liable to answer the action, his appearance must be entered by the Registrar in the Assignment Book as given under protest, and the party so appearing is to be assigned to deliver his act on protest to the adverse proctor within a limited time. The same course of proceeding is to be pursued on the act on protest as in cases of acts on petition (hereafter stated) up to the time of the hearing, when the Judge is either to pronounce for the protest and dismiss the suit, or overrule the protest and assign the party to appear absolutely, and the cause is then to proceed as if no appearance on protest had been given.

In contested suits the facts may be established either by libel or plea, and the examination of witnesses thereon styled "Plea and Proof;" or by an "Act on Petition," supported by affidavits, to which may be annexed exhibits or other documents to be verified in the affidavits.

§ 12. *Proceedings by Plea and Proof.*

When an appearance has been entered, the defendant is entitled to an assignment on the plaintiff to exhibit a libel within a time to be limited by the Judge.

The libel or plea is to be drawn by the plaintiff's proctor and settled by counsel, and then a fair copy, signed by counsel, is to be made for the Court, and brought in pursuant to the assignment; a copy is also to be delivered to the adverse proctor, and each proctor is entitled to make copies for the use of his counsel at the hearing.

There may be annexed to the libel or plea, documents or exhibits pleaded or referred to therein, of which copies are to be made in like manner, the originals being brought into Court. And upon the libel or plea being brought

in, the Judge is to assign to hear, on admission thereof, on the next court-day, or at a time to be named by him. The defendant's proctor may then lay the libel or plea before counsel for his advice, if the same be opposable, and if it be deemed by him not sufficient in law (supposing it be true) to warrant the plaintiff's prayer, the admission of it may be opposed; whereby if the plaintiff has no legal cause of action, the suit may be stopped *in limine*, it being the duty of the Judge to reject all pleas, which, if assumed to be true, will not justify him in pronouncing a decree for the party giving in such plea. Or if the plea contains matter unnecessary or irrelevant to the cause of action, or is drawn in too diffuse or argumentative a manner, the admission thereof may be opposed. Upon these objections coming on to be debated, the Judge will order the plea to be admitted, reformed, or altogether rejected as he shall see cause. If ordered to be reformed, the Judge will in his discretion direct the objectionable matter to be expunged and other points modified. If ordered to be rejected, such rejection puts an end to the suit.

On the libel being debated, a case on each side is to be prepared by the respective proctors, and delivered to counsel with copies of the libel and of the exhibits, if any, which copies, however, must afterwards serve for the use of the counsel at the final hearing.

Pleas, the admissibility of which is not objected to, are admitted to proof of course.

Pleas or allegations given in a subsequent stage of a cause, may be admitted, reformed, or rejected in a similar manner.

On the libel being admitted, the proctor giving in the same is to be assigned to prove its contents by evidence within a time to be limited by the Judge, and the party giving in the plea is entitled, if he desires it, to the personal answers in writing of the adverse party. In that

case a decree for answers is to be extracted from the Registry and served on the party, by shewing him the original under seal, and leaving with him a copy thereof. The answers are to be drawn by the proctor for the party required to give in the same, who must answer specifically to all the facts or allegations in the plea which are within his own knowledge, by either admitting or denying the same; and as to all matters, he must answer to his belief or disbelief.

No extraneous or irrelevant matter is to be introduced, but the party may set forth any matter necessary to explain his answer. If any facts are introduced which are capable of proof by witnesses, they must be established by evidence regularly taken on a plea. The answers are to be settled by counsel, and then the party attended by his proctor is to be sworn to the truth thereof before the Judge or Surrogate in the presence of the Registrar, who is to make and sign an attestation at the foot thereof. The Registrar is then to file them and make a minute in the Assignment Book, of their having been sworn and brought into Court. The adverse proctor may immediately inspect them without waiting for publication, and may have an office copy of them. And if they be insufficient, redundant, or contain matter not pertinent, may be objected to in the same manner as a libel or plea.

If after the return of a decree personally served, the party does not give in his answer within the time assigned, the Judge may decree an attachment against him for his contumacy; but notwithstanding this measure, the proctor for the plaintiff may proceed with the production of his witnesses and take other requisite steps in the cause.

§ 13. *Examination of Witnesses.*

The name of the witness and a designation of the

specific articles of the libel or plea on which he is to be examined, must be delivered to the adverse proctor and to the Registrar or Examiner, whereupon the proctor giving in the plea is to attend the witness and produce him before the Judge or Surrogate, in Court or chambers, when the witness is to be immediately sworn in the presence of the Registrar. Due notice of his intended production must be given to the adverse proctor, who may attend if he think fit. On the witness being so sworn, the Registrar is to make an entry thereof in the Assignation Book.

The deposition in chief is not to be taken upon written interrogatories, but by relevant questions put *vivâ voce* by the Registrar or Examiner, and arising out of the circumstances pleaded, but not so put as to lead the witness. If there are several pleas, witnesses are to be examined on each plea. The witness must not be dismissed until the lapse of twenty-four hours from the time of his production, so that the adverse proctor may have an opportunity to cross-examine him by interrogatories in writing if he think fit; and this time may be extended on reasonable cause to be shewn by the proctor through the Registrar to the Judge. Such interrogatories are to be drawn by the adverse proctor, and, when practicable, settled by counsel. They are then to be copied for and signed by counsel, and delivered to the Registrar, with instructions as to the particular interrogatories to be administered to each witness. When the witness has been examined in chief, and also upon interrogatories, if any are to be administered, the depositions in chief, and also the answers to the interrogatories (if any,) are to be read over to or by the witness and signed by him, and he is then to attend with the Registrar before the Judge or Surrogate in chambers, and make a declaration that he knows the contents of his deposition, and that the same are true in virtue of the oath by him taken

on his being produced ; and an attestation thereof is to be made at the foot of the deposition by the Registrar or Examiner.

The evidence of the witnesses is in all cases to be kept closely sealed, and the contents thereof are not to be divulged until publication shall have been passed ; after which, but not sooner, the proctor administering the interrogatories, if any are administered, is to deliver a copy thereof to the proctor producing the witness.

In the event of any witness refusing to attend to be examined, his necessary expenses having been tendered to him (but not otherwise,) a compulsory or subpoena, to be prepared by the Registrar, may be extracted, and served on the person so refusing to attend, by shewing to him the original instrument under seal, and leaving with him a collated copy thereof, and if he do not appear to this process, an attachment may issue against him for his contempt.

The witnesses for the plaintiff being all examined, his proctor may on the first court-day afterwards pray publication of the evidence, which is to be decreed to take place at a time to be fixed by the Judge ; and at the expiration of that time it is imperative on the opposite party to plead if he intends to do so at all ; for this purpose, he is to attend before the Registrar or Surrogate, and declare in a minute of Court that he intends to offer an allegation or counter-plea, and the same must be brought into Court within a reasonable time, to be assigned by the Judge. In that case, publication of the evidence must be stayed until the allegation be disposed of, either by being admitted or rejected by the Court, or by the party abandoning the intention of giving it in. If admitted, publication must be stayed until the whole evidence in the cause be taken. In the event of no allegation or counter-plea being given, or, if given, being rejected by the Court, or withdrawn by the party, publica-

tion of the evidence is to take place ; and thereupon the depositions may be inspected on each side, and copies thereof furnished to the parties at the request of their proctors, who may make copies thereof for their respective counsel.

After the evidence has been inspected, neither party can claim as a matter of right to give any further plea or allegation in the principal cause ; but if the Judge shall be satisfied by affidavit that there is any matter important to the issue, which could not have been pleaded before by reason that knowledge thereof had not come to the party prior to, or that the fact had occurred after the publication, the Judge in his discretion may allow such matter to be pleaded.

Allegations exceptive to the testimony of witnesses, may be given after publication in cases only where the matter on which they are founded, arises out of the evidence of the witness or witnesses excepted to, and where the contradiction, if proved, would tend materially to destroy his or their credit ; but no allegation exceptive to the testimony of witnesses is to be admitted, if the facts it contains either have been or could have been pleaded before publication. After publication, no allegation, pleading generally that the witness is not worthy to be believed on his oath, is to be received. Any such allegation, when offered, must precede publication, and must plead generally that the witness is of bad character and reputation, and not to be believed on his oath without imputing to him any specific charges.

When several pleas are given in a cause, witnesses are to be examined on each plea ; and all other steps are to be pursued in the same manner as directed in respect of the plaintiff's libel.

It is the duty of the proctors to take especial care that the libel and defensive allegation contain all the facts material to the decision of the cause, so that several pleas may not unnecessarily be given.

When publication shall have taken place on all pleas, the cause is to be set down to be heard at a time to be appointed by the Judge. Counsel are to be furnished with copies of all material papers, viz. pleas, exhibits, and depositions of witnesses, but not of warrants, decrees, or other formal instruments, unless from circumstances, the contents of such instruments may be material to the discussion of the cause. A case for hearing on each side is to be prepared by the respective proctors, briefly stating the proceedings which have taken place, and calling the attention of counsel to the decree which each party may pray the Judge to pronounce. The evidence is not to be abstracted, nor are documents of which counsel are furnished with copies to be more than merely described in the case. All lengthened details are to be avoided, but the attention of counsel is to be directed to the principal points. A reasonable fee is to be paid to counsel on the hearing; and if the case takes more than one day in argument, a moderate additional or refreshing fee is to be given for each subsequent day. Definitive sentences in writing are only requisite in derelict and piratical cases. In other causes the judgment may be given by interlocutory decree, and entered by the Registrar in the Assignation Book.

If it become necessary to enforce a judgment, a monition is to be taken out against the party principal and his bail, and served in the manner before directed in regard to instruments requiring personal service. Upon the return into Court of the monition, with a certificate of its due service indorsed thereon, and the tenor thereof not being obeyed, the Judge, upon motion of counsel, may decree an attachment against the person of the party monished for his contempt; directing either the attachment to issue immediately, or to be suspended for a reasonable time, as circumstances may in his judgment require. This attachment is to be extracted from the

Registry. The previous service of a monition may not always be necessary. Where the disobedience is manifest upon the face of the proceedings, and it is clear that the order of the Court must be known to the party, an attachment may be decreed without a previous monition; but in cases where sureties are to be attached, a previous monition is indispensable. Upon compliance with the order for disobedience of which the attachment issued, and upon payment of the costs of the attachment, the Marshal, or other person executing it, is to release the party, certifying to the Judge fully what has been done; but in cases of doubt he may resort to the Judge for directions previous to the release.

§ 14. *Proceeding by Act on Petition.*

In case bail has been given to the action, a minute is to be made in the Assignation Book by the Registrar, assigning the proctor for the party proceeding to deliver his act on petition to the adverse proctor by a time to be fixed by the Judge. The proctor is then to set forth the facts of his case in a plain narrative manner, without argument, and concluding with his prayer. This, having been settled by counsel (for which purpose he is to be furnished with a copy), is to be copied fair for the Court, and then delivered to the adverse proctor that he may reply thereto, and with the reply, it must be returned to the proctor of the party proceeding, that he may make a rejoinder thereto if necessary. The reply and rejoinder must also be settled by counsel in the same manner as the act.

The facts alleged in the act on petition are to be supported by affidavits; and any necessary exhibits, or documents annexed thereto, are to be verified in such affidavits, which are to be confined to the material averments, and are not to be settled by counsel.

Should any delay occur in the delivery of the act from one proctor to the other, either of them may allege the same, in the presence of the Registrar, before the Judge, who is to direct the act to be returned by a time to be specified; and if it be not returned by that time, or good cause shewn for the delay, the Judge is to assign to hear the act on petition *ex parte*, that no unnecessary postponement may take place, for which purpose a copy of the act, instead of the original, together with the affidavits on behalf of the party, must be brought in by the proctor applying to have the cause so heard.

When the article is concluded, it is to be signed by both proctors who are to attend before the Judge or Surrogate, in the presence of the Registrar, to bring in the same, together with the original affidavits and exhibits. No further affidavits or documents are to be afterwards received, unless by leave of the Judge obtained on special application. The Judge is then to appoint the cause for hearing, and thereupon one copy of the affidavits and exhibits is to be made for each of the counsel, and one for the adverse proctor, to be delivered to him when the originals are brought in. The adverse proctor is also to make copies for his own counsel. The same rules, as to the preparing the case for hearing, delivering copies of papers, fees to counsel, and the same proceedings for enforcing obedience to the decree, are to be observed as in a cause conducted by plea and proof.

§ 15. *Suits for Mariners' Wages.*

The same regulations as to the arrest of a ship, the subsequent proceeding by default or *in pœnam*, and the rules for conducting a cause by plea and proof, are to be applicable to the suit of a mariner for his wages, which is called a cause of subtraction of wages, in which the mariner may proceed against the ship, freight, and

master, or the ship and freight, or the owner or the master alone; and any number of mariners, not exceeding six, may proceed jointly in one action.

When an appearance is given, the proctor for the party proceeding is entitled to an assignation on the defendant to bring into Court the mariner's contract and ship's books; and he is not compelled to file his libel until they are so brought in.

The libel, if in common form and pleading no special matter, should state the hiring, rate of wages, performance of service, and the refusal of payment; and should have annexed to it a schedule, stating the whole amount of wages, with the sum received on account, and the balance claimed to be due. This plea is termed a summary petition, and should not be settled by counsel.

§ 16. *Suits for Pilotage.*

Suits for the recovery of pilotage, where no party appears to defend the action, may be conducted by default or *in poenam*. When contested, the proceeding will be by plea and proof; the libel or plea, as in suits for wages, if containing no special matter, is also called a summary petition, and need not be settled by counsel.

§ 17. *Suits of Bottomry.*

These suits may likewise be conducted by default or *in poenam*, and ships may be sold, in virtue of a decree of the Court, for the payment of bottomry bonds without any appearance having been given to defend the action.

When the validity of the bond is contested, the cause generally proceeds by act on petition and affidavits, but the party promoting the cause may, if he thinks proper, proceed by plea and proof: and it is competent to defendant, on his appearance, to require the cause to be

conducted in that manner, for which purpose he must pray the Judge to assign the promoter to bring in a libel.

Before the warrant is extracted from the Registry, the original bond must be exhibited to the Registrar in addition to the usual affidavit.

§ 18. *Causes of Damage by Collision.*

These causes may also be prosecuted by default or in *pœnam*. When defended, the suit is conducted by plea and proof, and differs in no respect from that mode of proceeding already detailed.

Suits of Damage by Beating or Assault on the High Seas.

In these cases the suit is by plea and proof, and the warrant is necessarily against the person.

Prosecutions for contempt in breach of the Maritime Law, and of the Regulations and Instructions Relating to His Majesty's Service at Sea.

These prosecutions can only be instituted on complaint by an officer in His Majesty's Navy, and under the directions of the Lord High Admiral, or the Commissioners for executing the office of Lord High Admiral of the United Kingdom, or of some one of the Admirals or Commanders in Chief of the naval squadrons abroad, and are to be conducted in the following manner :—

An affidavit of two persons is to be exhibited by the proctor for the Crown, stating the name and description of the party intended to be proceeded against, and detailing the particulars of the offence committed, which affidavit, with a short case, is to be delivered to the advocate for the Crown to move the Judge to decree the warrant of arrest, who, in making the decree, is to specify the amount of the bail to be given as he shall consider sufficient to ensure the personal appearance of the party

prosecuted when judgment shall be pronounced. This amount is to be stated in the Action Book and on the face of the warrant. The Marshal is then to execute the warrant by the arrest of the person of the offender, who is to be liberated on giving sufficient bail, which is to be taken in the usual manner.

On the appearance being given, the proctor for the Crown is to be assigned to exhibit articles pleading the offence within a short time to be specified by the Judge.

These articles are to be prepared by the proctor for the Crown, and may be settled by counsel, and the cause is then to proceed like other suits, by plea and proof, with the following exceptions :

1st. On the articles or plea being admitted to proof, the defendant must be assigned to declare in act of Court, within a reasonable time, generally whether he denies the facts pleaded, which is termed giving a negative issue, or whether he confesses them, which is termed giving an affirmative issue.

2ndly. In case of an affirmative issue, the judgment of the Court may be immediately pronounced, on which occasion the defendant is to be allowed to exhibit affidavits in mitigation of punishment, but not to deny the offence charged.

3rdly. Extended personal answers in writing to the different positions or averments of the articles cannot be required from the defendant.

4thly. Where a negative issue is given, the defendant may be at liberty to offer a defensive plea.

After the evidence is taken, if the Judge shall decide that the charge is established, he will proceed to give sentence, imposing the fines due by law on the defendant and condemning him in the costs. In very aggravated cases, the defendant may also be imprisoned for a limited time. Affidavits in mitigation may be offered and are to be received when the offence has been proved by evidence.

§ 19. *Suits for Salvage.*

The ordinary course of proceeding is by act on petition, but in cases where no appearance is given these suits may be prosecuted by default or *in penam*. The property must on no account be released from arrest until a value shall be agreed upon between the parties and alleged in minute of Court, which is to be entered by the Registrar in the Assignment Book.

If the value cannot be agreed upon, a decree of appraisement must be extracted by the proctor for the salvors, and executed and returned into Court before the property is released. This constat of the value is necessary both for regulating the amount of bail to be taken, and for guiding the Judge, at the final hearing, in fixing a proper remuneration for the services of the salvors, with reference to the value of the property saved.

§ 20. *Causes of Possession.*

These causes are to commence by the entry of an action at the suit of the owners or owner of a majority of interest in the ship, and a warrant is to be issued to obtain possession thereof from any party who may withhold the same. No amount of action need be inserted in the Action Book, or on the face of the warrant.

An affidavit of the party proceeding is to be prepared by the proctor, and laid before counsel, with a short case stating the circumstances, in order to move for the warrant, which can be obtained only on motion of counsel. The affidavit need not previously, as in other cases, be left in the Registry. On this occasion, the Judge or Surrogate is to be attended by the proctor, counsel, and Registrar; and the Judge, on reading the affidavit, if it be satisfactory, will, on motion of counsel, decree the warrant citing all persons in general to appear and answer

to the party proceeding in a cause of possession. The warrant having been served on the ship is to be returned into the Registry, and if no appearance be given within a month from such return, the Judge, if satisfied that the party proceeding has a majority of the legal interest, is, on the affidavit originally brought in or on further proofs, if necessary, being exhibited on motion of counsel on the next regularly adjourned court-day, by interlocutory decree to order possession of the ship to be delivered to the party proceeding, or if necessary assign a further limited time for entering an appearance, and on any subsequent regularly adjourned court-day in like manner pronounce his decree, which is issued by the Registrar from the Registry.

Should any party appear to contest the right of possession, the cause is to proceed by act on petition and affidavits, the ship remaining in the custody of the Court until the final hearing, because the object of the suit, which is to obtain actual possession of the property, cannot otherwise be secured.

Upon an interlocutory decree being pronounced in favour of either party, a decree of possession is to be issued accordingly.

During the dependence of the suit on proof by affidavit being exhibited that the ship's register is in the possession of any person whomsoever, a monition may be issued requiring him to bring it in, or shew cause why it should not be brought into the Registry to abide the event of the suit. Or, after the hearing, should the ship's register remain in the possession of any person, the Judge may, on proof thereof, issue a monition directing him to deliver up the same to the party in whose favour the decree has been made.

Causes of possession may also be conducted by plea and proof at the option of either party.

§ 21. *Action to obtain Security for the safe Return of a Vessel.*

Actions of this description occur when a part owner is dissatisfied with the management of his co-owners, and requires the ship to be restrained from proceeding on a voyage until bail shall be given for her safe return to the port to which she belongs.

An affidavit of the party is first to be made setting forth the number of shares of which he is the legal owner, that he is dissatisfied with the management of the ship, and is desirous of obtaining bail for her safe return to the port to which she belongs, to the amount of the value of his shares, which value is to be stated in the affidavit. And upon this affidavit, which need not previously be left in the Registry, the Judge or Surrogate in chambers is to be moved by counsel to issue the warrant of arrest.

The action should be entered in the amount of the value of the shares of the party proceeding, and in a further moderate sum to cover the costs; and on bail being given, the vessel is to be released and allowed to proceed on her voyage.

In case of the parties differing as to the value of the vessel, she must be appraised under the authority of the Court; and the actual value of the shares of the party proceeding at the period of giving bail, whether the ship be appraised or not, is the amount to be recovered in case the bond shall ultimately be pronounced to be forfeited.

The costs of the arrest are to be borne by the party proceeding; and the costs of giving bail by the defendant, unless the Judge shall see cause to order otherwise.

In the event of the loss of the vessel before her return to the port to which she belongs (until which time the bail bond remains in force), the party principal and his sureties may be called on by monition to shew cause why they should not bring in the amount of their recognizances,

in order to abide the judgment of the Court. To obtain this monition an affidavit must be exhibited, showing that the bond has become forfeited, and it must be moved for by counsel before the Judge or Surrogate. The monition when obtained requires personal service.

Should an appearance be given and the suit be contested, the proctor of the party proceeding is to be assigned to deliver an act on petition to the adverse proctor, and the cause is then to take the same course as other cases conducted by act on petition.

§ 22. *Derelict Cases.*

In cases of derelict the action is to be entered and the warrant extracted by the proctor for the Admiralty, without any amount of action being stated in the Action Book or on the warrant, and no affidavit is necessary to obtain the warrant, which, when issued, is to be served by affixing it for a short time on the ship or goods found derelict, and by leaving thereon affixed a true copy thereof. The warrant is then to be returned by the proctor into the Registry.

After the lapse of three months from the return of the warrant (the property remaining in the custody of the Court), the Judge, on the next regularly adjourned court-day, at the petition of the proctor, and on his allegation in Court that the warrant has been returned upwards of three months, and that no appearance has been given, is to decree a monition to issue, calling upon all persons to appear and shew cause why the property should not be condemned, at the expiration of a year and a day from the return of the warrant, as droits and perquisites of His Majesty in his office of Admiralty. The monition is to be made returnable at three months after its date, and is to be served by affixing the original for a short time either on the Court-House or on the Exchange, or place of com-

mon resort of merchants, or as the usage of the colony or settlement may be, and by leaving thereon affixed a true copy thereof. The object of this general service is to give the utmost publicity, so that the contents of the monition may be most likely to reach the knowledge of all parties interested. After this service, the monition is to be returned into the Registry, with a certificate of service indorsed thereon.

If the property be in a perishable condition, and the Judge be satisfied by affidavit at any period after the arrest that it would be for the benefit of all parties interested therein that the same should be forthwith sold, it may be appraised and sold under the direction and authority of the Court, and the proceeds paid into the Registry.

At the expiration of a year and a day from the return of the warrant, if no claim or appearance be given for the owners, the Judge, on the next regularly adjourned court-day, is to proceed to condemn by sentence the property as droits and perquisites of His Majesty in his office of Admiralty. The sentence is to be prepared by the proctor, who is to make a fair copy thereof, for the Judge's signature, which is to be signed in Court in presence of the Registrar, and a certificate is to be added by the Registrar on the sentence, and a minute made in the Assignment Book of the same having been so signed.

The owners of property proceeded against as derelict, may appear at any time before the termination of the cause, and claim the same without being liable to any fees of contumacy incurred prior to their appearance. The claim with an affidavit in verification thereof, is to be drawn by the proctor, and should set forth the name, residence, and occupation of the owner, the title of the party to, and the identity of, the ship or goods claimed. Documents or exhibits in support of the affidavit may

be annexed thereto. When the claim and affidavit have been settled by counsel, the proctor is to attend his party before the Judge or Surrogate, to be sworn to the same in the presence of the Registrar, and the Judge will then assign to hear on admission thereof on the next court-day, or at any other time to be by him fixed, of which notice is to be given to the parties. A copy of the affidavit and claim is to be given to the proctor for the Crown, and if the counsel for the Crown be satisfied that the party claiming is entitled to restitution of the property, he is to consent to the same being restored, which on motion of counsel before the Judge may be immediately done on payment of the salvage, and the expenses on behalf of the Crown. The instrument of restitution is to be prepared by the Registrar, and extracted from the Registry by the proctor for the claimant. The interests of salvors are always to be protected, and to this end, if restitution be consented to, and if salvage has not been previously paid, bail to our Sovereign Lord the King, in his office of Admiralty, in a sum sufficient to answer salvage, must be given by two persons on behalf of the owners before the instrument of restitution is to be issued.

If the title to the property is contested, the cause must come on to be heard in Court; a case and papers being delivered to counsel as in other contested causes.

§ 27. *Prosecutions for breach of the Revenue or Navigation Laws.*

An affidavit is to be made by the seizer, detailing the grounds of the seizure and the circumstances attending the same, to which, in the case of a vessel being seized, is to be annexed all original papers that have been delivered up at the time of seizure, and which must be verified in the affidavit. Or if the ship's papers have

been concealed, thrown overboard, or destroyed, the fact of such concealment or destruction should be stated in the affidavit.

The affidavit is to be exhibited to the Judge or Surrogate, who is to decree a monition to issue, returnable fourteen days after service, citing by name the owners, or persons implicated (if known) in special, and all others in general, to appear and shew cause why the forfeiture should not be decreed, and the penalties due by law pronounced for: but where the parties are not known the monition must only cite all persons in general.

When the monition specifies the names of the parties cited, it must be personally served on them like other instruments requiring personal service, and must also, like other monitions where the names of parties are not mentioned, be served on the Exchange or Court-house, or other public place, as before directed respecting instruments requiring service against all persons in general.

The monition having been served and no appearance being given, the Judge is to proceed by interlocutory decree to condemn the property: but such condemnation is not to take place on any other than a regularly adjourned court-day, and not until the expiration of fourteen days from the return of the monition, and if it has been personally served, the Judge may, without requiring any further evidence than the affidavit to lead the monition, pronounce for the penalties due by law.

If a personal service of the monition cannot be effected by reason that the persons named therein have purposely absented themselves to avoid the service, the Judge may pronounce a similar decree; but if he has reason to believe that the persons named in the monition are *bond fide* ignorant thereof, he is to reserve his judgment so far as relates to the penalties sued for, and also as to the property, should any doubt arise upon the evidence.

In the case of a monition citing all persons in general, and not describing any person by name, no penalties can be pronounced for, but if the persons by whom the offence was committed shall afterwards be discovered, a subsequent monition may be issued in the same suit against him or them for recovery of the penalties.

In order to move for the interlocutory decree, a case, with a copy of the affidavit, must be delivered to counsel.

A claim may be given on behalf of the owners at any time before the interlocutory decree, and the claimant may, if he think fit, require the seizer to file an information or libel, to which the claimant may give in a responsive plea or allegation, and the case will then proceed by plea and proof in the manner before mentioned.

To the claim must be annexed an affidavit, containing the names, descriptions, and residence of the owners, and a detail of all the circumstances on which the claimant means to rely as the grounds of his defence.

The claim and affidavit are to be prepared and given in as directed in derelict cases; but in compliance with the Act of 6 Geo. 4, c. 114, s. 62, security must be given on behalf of the claimant in the sum of 60*l*. sterling, to answer costs before any claim can be received.

Upon a claim being filed, the Judge, with the consent of the Collector and Comptroller of the Customs, may order the delivery of the property to the claimant on his giving bond, with two sufficient sureties, to answer double the value of the same, as provided by the 58th section of the said Act.

The Court, on the application of the officer of the Customs, or parties interested, may, at any time before condemnation, direct the property to be sold, if it shall satisfactorily appear by affidavit that a sale will be beneficial to all parties interested.

When a claim is given, and no libel prayed, the Court may proceed to adjudge the case upon the facts and

circumstances stated in the affidavits on both sides : but if it shall appear to the Judge that the case is not sufficiently proved by such evidence, he may direct an information or libel to be filed by the seizer, and give leave to the claimant to file a responsive allegation : in which case witnesses are to be examined on both sides, and the cause will proceed as in plea and proof cases. After condemnation, the sale must take place according to the provisions of the 56th section of the said Act.

In order to remedy complaints which have been made of the burthensome law charges in the Colonies, on proceedings in revenue cases of small value, it is directed, that any number of seizures, not exceeding in the aggregate value 300*l.*, and not individually exceeding the sum of 100*l.*, may be included in one monition, and that different seizing officers may proceed conjointly in the same prosecution,—care being taken that the monition, and also the libel where that proceeding is required, be drawn conformably with the several circumstances, and that the different seizures be described in separate articles or counts of the libel or information. And to obviate any possible delay in the proceedings of the seizing officer, any claimant is to be at liberty to take out a monition against the seizer, returnable three days after service thereof, requiring him immediately to proceed to the adjudication of the property seized. For this purpose, and also to enable the seizer to determine whether to proceed separately as to one seizure, or to wait for the chance of including other seizures in the same process, by a consideration of the expenses of warehousing and custody of the seizure, the seizer is, without delay, in all cases where the probable amount of the seizure does not exceed in value 100*l.* to report the facts to the Registrar of the Court.

In cases where it shall be deemed necessary to proceed

immediately without waiting for other seizures, and the value is under 100*l.*, the several charges of the proceeding and adjudication are to be reduced 25*l.* per cent. upon the usual charges; and if the property separately proceeded against does not exceed the value of 50*l.*, one half of the usual fees only are to be charged.

§ 28. *General Rules to be observed in Practice.*
Subduction of an Action.

If a party proceeding, determine to abandon his suit, or has compromised the same, he may at any period be allowed to subduct the action; to which end, the proctor who has extracted the warrant is to sign a short entry to that effect in the Action Book, and the property, if any have been arrested, is to be immediately released.

§ 29. *Tender.*

Whenever a tender is made on behalf of a defendant to pay a certain sum of money, the sum tendered must be brought into the Registry, and an undertaking given for payment of the costs incurred up to that time; this must be done before the Judge or Surrogate, in the presence of the Registrar and the adverse proctor, and a minute thereof is to be entered in the Assignment Book, and the proctor for the plaintiff is to be assigned to declare whether he will accept the tender or not, within a time to be limited by the Judge.

If the tender be refused, and the Court shall ultimately consider the same to have been sufficient, the plaintiff, in general cases, is to be subject to all the costs incurred subsequent to the refusal, but under special circumstances, where the enforcement of this rule may be attended with injustice or hardship, the Court may

exercise its discretion by forbearing to condemn him in costs.

§ 30. *References.*

In cases where a reference of the subject in litigation may be expedient, the Judge, either for his own satisfaction or at the instance of either of the parties, may refer any accounts or demands, or any matter incidental thereto, to the Registrar, directing him to take to his assistance one or two merchants, and to investigate and report on the matter. The merchants to be selected by the Registrar and approved by the Judge.

The reference being ordered, the Registrar is forthwith to make an appointment with the proctors of the parties and with the assistant merchant or merchants, and all necessary documents being produced, the Registrar and merchants are to hear the matters in dispute discussed by the proctors and the parties principal, or their agents. The Registrar is afterwards to draw up the result of the investigation, and of their joint deliberation thereon, in a written report, to be brought into Court, and a minute to that effect is to be thereupon made in the Assignment Book.

The Judge is to direct the report to be confirmed, unless objected to by either party by the succeeding adjourned Court-day, or within a time to be limited by him. The report may be confirmed at the prayer of either of the proctors, and either may object to the report wholly or in part; but the party objecting must so declare in act of Court, and is to be assigned by the Judge to deliver in an act on petition, setting forth his objections to the adverse proctor, within a time to be limited. And the subsequent proceedings are then to be conducted as on all other acts on petition.

§ 31. *Taxation of Costs.*

The proctor of the party who has obtained a decree or order condemning another party in the costs, is to furnish the adverse proctor and the Registrar each with a copy of his bill, and to attend the Registrar to procure an appointment to tax the same, of which notice is to be given to the adverse proctor, that he may be present thereat; and if he shall decline, or neglect to attend, the taxation may proceed in his absence upon an affidavit being exhibited to and filed with the Registrar, shewing that a copy of the bill had been furnished, and that twenty-four hours' previous notice of the appointment had been given to him.

If the amount of the costs ascertained by the Registrar be not forthwith paid, the Registrar is to report the amount to the Court, when, if no objection be made, the Judge is to sign the bill, which completes the taxation, and a minute thereof is to be entered in the Assignment Book.

If the adverse proctor be dissatisfied with the amount proposed to be allowed, he is, on the same being reported and before the bill is signed by the Judge, so to declare in Court; and in that case the Judge is to assign him to deliver an act on petition in objection to the taxation within a short time to be specified, and subsequently the same course is to be pursued as in other acts on petition.

When the Judge has signed the bill, whether as originally reported by the Registrar, or with any subsequent alteration, he is to decree a monition for payment thereof: and if the costs be not immediately paid, such monition may be extracted and served as usual, and may be followed up by attachment if necessary.

§ 32. *Incidental Monitions.*

In any cause, however commenced, monitions may incidentally become necessary, which are to be made returnable at a period to be fixed by the Judge; and if the tenor of the monition be not complied with, the Judge, on proof that it has been duly served, may enforce obedience thereto by attachment.

§ 33. *Commissions.*

Commissions to take bail, to take the answers of parties to a libel or allegation, to take the oaths of parties or others to affidavits, to examine witnesses, and the like, may, under the authority, and at the discretion of the Judge, issue in cases where the parties reside at so great a distance that the transaction of the business by commission will be attended with less expense than their personal appearance before the Court.

Commissions may also issue for the unlivery of a cargo, for the appraisement or sale of a ship or cargo, or for the appraisement and sale of a ship and cargo in cases when, by reason of the distance, the Marshal cannot be conveniently employed for the purpose without great expense.

All commissions are to be directed to respectable merchants, or professional men named by the proctors; and when they can agree thereto, one Commissioner will be sufficient, otherwise a Commissioner is to be nominated by each party.

§ 34. *Acts on Petition.*

In cases where any incidental matter may become the subject of dispute, and either of the parties shall desire it, or if the Judge shall deem it necessary for his own

satisfaction to have the facts further elucidated, he may direct the circumstances to be set forth in an act on petition.

§ 35. *Appeals.*

All appeals from decrees of the Vice-Admiralty Courts are to be asserted by a party in the suit within fifteen days after the date of the decree, which is to be done by the proctor declaring the same in Court; and a minute thereof is to be entered in the Assigment Book. And the party must also give bail within fifteen days from the assertion of the appeal in the sum of 100*l.* sterling to answer the costs of such appeal.

In all cases, however, in which an appeal is asserted, except respecting slaves, the Judge may proceed to carry his sentence into execution, provided the party in whose favour the decree has been made give bail to abide the event of the appeal, by two sureties in the amount of the value of the property or subject in dispute, together with the further sum of 100*l.* sterling to answer costs, in the event of the same being awarded by the superior Court.

The party appealing, having complied with these regulations, is then to cause the Judge and Registrar to be served with an inhibition from the High Court of Admiralty, restraining them from further proceeding in the cause, and also with a monition to transmit the process.

This process will consist of a fair copy of the proceedings under the seal of the Vice-Admiralty Court, to be made and signed by the Registrar, at the expense of the party ordering the same, which is to be transmitted to the superior Court pursuant to the monition.

The proceeds, if in Court, or in the hands of any individual, must, on a special monition for that purpose being served, be remitted to the Registrar of the High Court of Admiralty or Court of Appeal.

§ 36. *Regulations as to the Sittings of the Court.*

Before the rising of the Court, the Judge is always to adjourn the same to a day to be by him fixed at his discretion, and proclamation thereof is thereupon to be made in open Court by the Marshal or officer of the Court. It is, however, competent to the Judge, notwithstanding such adjournment, subsequently to appoint an intermediate day or days, as may appear to him to be necessary, for the expediting any particular cause or causes before the Court.

Forty-eight hours' notice of such intermediate court-days must always be published in the Gazette or public newspaper of the colony by the Registrar, at the expense of the party at whose instance or for whose benefit the Court is to be so called, which expense is to be paid by the proctor.

Care is always to be taken that on such intermediate court-days, no assignation be sped, or order made, precluding the right, or to the manifest injury of any absent party, when it shall appear that he cannot have received sufficient notice of the sitting of the Court; and absent parties are always to be entitled to the favourable consideration of the Judge, if on the next succeeding regularly adjourned court-day cause shall be shown why an assignation made on any intermediate court-day had not been complied with.

In like manner, when an assignation has been made for an act to be done by a limited time, shall not have been duly complied with, and an intermediate court-day shall be subsequently held, parties who cannot by possibility have been cognizant of such intermediate Court, and who may have very conclusive reasons to allege why they have been unable to comply with such assignation, are not to be prejudiced by the enforcement of the same on such intermediate court-day.

§ 37. *As to the Return and Service of Warrants,
Monitions, and other Instruments.*

In general cases, warrants, monitions, and other instruments are to be made returnable, and parties cited to appear at the Registry, either on a certain day mentioned, or at the expiration of a certain number of days after service, to be specified in the instrument, and between any two hours of the day most usually appropriated to public business.

Monitions to pay costs or a sum of money, or to do any specific act within a certain number of days, are to be returnable at the expiration of the usual hours of business at the Registry, on the furthest or last day assigned to the party to do the act.

If no appearance be given thereto, the Registrar is immediately on the expiration of the time specified to attend before the Judge or Surrogate in Court or Chambers, with the proctor who is to return the instrument; and the proceedings are subsequently to be continued according to the requisites of the cause. The day of such return is the period from which is to be reckoned, for all future purposes, the contumacy or default of the party cited and not appearing.

Instruments against all persons in general, and which are served only on the ship or goods, or on the Exchange, or principal resort of merchants, or on the Court-house, can only be further proceeded on *in pœnam* on the regularly adjourned court-days. But an instrument which has been personally served and duly returned, may be followed up by all further proceedings, even to attachment, without more regard to the regularly adjourned court-days than would be necessary respecting any other incident in the proceedings, because in such cases the party who has been served must always be aware of the

liabilities to which he is exposed by his own laches, or contempt.

If an instrument be served on a ship, or goods laden on board a ship, when the master is on board, and the action be one to which he ought to appear and become a defendant, such service may, for the purpose of future proceedings, be considered equivalent to a personal service on him.

Wherever any monition or other instrument is served by any other person than the Marshal, the certificate of the service thereof must be verified by an affidavit of the person serving the same.

All warrants, monitions, and other instruments requiring ulterior proceeding *in pœnam*, in case of no appearance or of non-obedience, must be duly returned at the time specified for their return; and if not then duly returned, no further proceedings can be had thereon.

§ 38. *Interlocutory Decree.*

The interlocutory decree, which must always be moved by counsel, is the final act of adjudication in the principal cause of action in any suit. But in some few instances a suit may be terminated without it, viz:—

Where a libel is rejected.

Where a defendant is dismissed because the promoter does not bring in his libel.

Where a protest is pronounced for, and the party appearing under protest is dismissed.

Where an action is subducted.

If sureties apply to be dismissed from their recognizances, it must be done by interlocutory decree; but if they are dismissed by the interlocutory decree in the principal cause, no further decree of that kind is necessary for their dismissal.

The fees due to the Judge, and officers on an inter-

locutory decree, are chargeable to all parties who receive benefit under the same; thus, in a case of derelict, the fees are chargeable to the claimant who obtains restitution of the property, and to the salvors to whom salvage may be awarded.

No decree is to be made, nor act of Court to be sped by the Judge or Surrogate, without the presence of the Registrar, by whom a minute or record thereof must be made and attested, except only in case of the Registrar's unavoidable absence, on which occasion the Judge or Surrogate may assume an actuary to attest *pro hac vice* the act to be done. Any practitioner of the Court, provided he be not concerned in the suit in which the act is to be done, may perform this part of the Registrar's duty, attesting by his signature the entry of the act in the Assignment Book.

§ 39. *Monitions.*

If a monition be not decreed at the time an interlocutory decree is made, it may, at the petition of the proctor on either side, be decreed on any court-day afterwards.

No monition to pay costs can be extracted until after such costs shall have been regularly taxed by the Court.

§ 40. *Proxies.*

Although proxies are not usually exhibited in maritime suits, yet they may sometimes be required in order to prevent proctors from proceeding in causes on instructions from parties not being themselves entitled to intervene, or not having a legal *personæ standi* to prosecute a cause.

§ 41. *Other General Rules.*

Upon the execution of commissions to take bail, the sureties must always justify their sufficiency before the Commissioners, by being sworn to an affidavit, to be drawn by the Registrar and annexed to the commission; and when bail is not taken by commission, and the Court orders the sureties to justify, a similar affidavit must be made.

When a cargo has been delivered to the consignee, and he has not paid the freight, or when freight has been paid, and is in the possession of the owner of the ship, master, broker, or any other person, such freight may be arrested by service of a warrant, upon the consignee or the person in whose hands the freight remains.

The same course is to be pursued when, under similar circumstances, a monition is to be served to bring the freight into the Registry.

All commissions of unlivery, of appraisement, and of appraisement and sale, are to be extracted by the proctor for the plaintiff or promoter in the cause.

In those Courts in which it may be necessary that the same individual should act as advocate and proctor, he may elect in which of the two capacities his fee, in those instances where the duties are necessarily exercised together, shall be charged, and the practitioner is in no instance to be allowed to receive fees for the same business in both capacities, nor to take a fee as counsel where the act of a proctor only is necessary. The same rule will apply to the fee specified in the table for a consultation in any intermediate stage of the proceeding, should a "necessity arise to resort to counsel for advice;" but an advocate's fee for consultation is not to be charged on any occasion where a reference to counsel would not have been necessary. The practitioner in such cases is only to be entitled to the fee for consultation as a proctor.

If the practitioner charges the advocate's fee for motion necessarily made by counsel before the Judge in the progress of the cause, he is not to charge or be allowed the proctor's fee for attending such motion, and where he charges the advocate's fee "for the hearing," he is not also to charge or be allowed the proctor's fee "for attending informations on the final hearing;" nor is he in any case, when acting as counsel in the cause, to charge the proctor's fee for attendance to fee counsel.

In the case of the charges for drawing, and the fee for settling any plea, affidavit, interrogatories, answers, and the like, the practitioner acting in both capacities is not to be entitled to the full fee for drawing, and to charge a copy to settle, and also a fee for settling the same; but may be allowed, instead thereof, to charge such fee as the table prescribes for the advocate on settling, and also a moiety of the charges allowed by the table to the proctor for drawing and copying.

It being provided by the 5th section of the Act, under the authority of which these regulations are established, that persons feeling themselves aggrieved by the allowance of any charges made by any officers or practitioners in the said Vice-Admiralty Courts, as not warranted by the established tables of fees, may have such charges re-taxed by the authority of the High Court of Admiralty of England, upon summary application thereto.

It is requisite when such applications are intended to be made to that Court, that a set of the copies of all papers previously made out and used in the proceedings upon which the charges objected to have arisen, or so many of them as may be necessary to explain or support the disputed charges, be transmitted to England; or if such copies cannot be transmitted without incurring an expense disproportionate to the object, it will be sufficient, as a substitute for the same, that an affidavit be made stating summarily the nature of the proceedings and the

decree in the cause, a description of the different papers and the number of folios contained in each of them, and such facts or circumstances as will explain the nature of the cause and the charges objected to; which affidavit is to be filed in the Registry of the Vice-Admiralty Court, to give the officer or practitioner whose charges may be objected to, an opportunity of replying thereto, which he should do within a period not exceeding fourteen days, to be limited by the Judge, who is then to order the costs already taxed to be referred for revision to the High Court of Admiralty, with copies of the affidavits. But, previous to any such order of reference being made, the party complaining must pay to the adverse proctor such part of the allowed charges as is not objected to, and must bring the remainder into the Registry of the Vice-Admiralty Court, to abide the decision of the High Court of Admiralty.

NOTE.—The foregoing Rules and Regulations touching the practice and proceedings in the several Courts of Vice-Admiralty Abroad, are extracted from a Report addressed to the Lords Commissioners of His Majesty's Treasury, drawn up and signed by

JAMES FARQUHAR,
H. B. SWABEY,
WILLIAM ROTHERY,

and perused and approved by

HERBERT JENNER,
JOHN DODSON,
STEPHEN LUSHINGTON,

And the whole, together with the Table of Fees for the respective Colonies (regulated and approved by the same persons,) were submitted to and approved by the Right Honorable Sir CHRISTOPHER ROBINSON, Judge of the High Court of Admiralty.

SUPPLEMENTARY RULES

Established by the Queen's Order in Council, dated at the Court at Buckingham Palace, the second day of March, 1848.

The rules and regulations established by the King's Order in Council of the 27th June, 1832, are not to be construed to have set aside the former practice of the Courts of Vice-Admiralty, of allowing the defendant to require from the promoter to libel with sureties, unless the promoter should be admitted by the Court to his juratory caution.

From the shortness of the season of the navigation at the port of Quebec, and the danger and risk to ships towards the close of the navigation in the autumn, from even so short as twenty-four hours' notice of bail, to answer an action, the period of notice of bail as provided by the 11th section of the above rules and regulations, shall not be required where the parties who are proposed as the bail make oath that they are respectively worth more than the amount for which they are proposed as bail or security, over and above the amount of all their just debts.

J. DODSON,
JOSEPH PHILLIMORE.
WM. ROTHERY.
H. B. SWABEY.

CASES IN THE VICE-ADMIRALTY COURT FOR LOWER CANADA.

Tuesday, 18th October, 1836.

AGNES—TAYLOR.

Defence grounded on a *res judicata* must be specially pleaded ; so also must misconduct, with proper specification of the acts thereof. Court may exercise a legal discretion as to costs. Costs refused in this case.

This was a cause of subtraction of wages brought by the mate of the vessel. The facts of the case are fully adverted to in the following opinion of the Court.

JUDGMENT.—*Hon. Henry Black.*

The present suit is brought by the promoter, as mate of the schooner Agnes, for a balance of wages, amounting to 110*l.* currency, calculated from the 5th June, 1834, to the 4th April, 1836, at 5*l.* per month, deducting 4*l.* for which the promoter gives credit as received in advance. A day having been assigned to the promoter to prove the contents of his libel, several witnesses were produced by him, and examined. Publication of the promoter's evidence was ordered by consent, without a responsive allegation being asserted on the part of the owners, who appear and defend the suit. From the evidence so taken on the part of the promoter, is established the fact of the service of the promoter, as mate on board of this vessel,

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from the 5th of June to the 18th of October, 1834, on a voyage from Quebec to the West Indies, and thence down to the promoter's leaving the vessel on the last mentioned day at Malbay, in the District of Gaspé, on her return voyage to Quebec, the further prosecution of that voyage having been at Malbay abandoned by the owners. The only evidence of the rate of the promoter's wages, is to be found in the evidence of Mr. Le Moine, who says he believes that by the ship's articles the promoter was rated at 4*l.* per month. The voyage to Quebec appears to have been abandoned on the arrival of the vessel at Malbay. She appears to have been chartered by the owners on a voyage to Jersey, and to have taken on board part of her cargo, but did not proceed on this last voyage in consequence of the refusal of the collector to grant a permit. The owners file a protest, to show that the vessel had been wrecked at Malbay, to which protest the cross interrogatories of the owners apply.

The averments in the libel concerning the termination of the voyage at Malbay, and the cause of the promoter's leaving the vessel there, are by no means as clear and explicit as might have been desired, and I do not hesitate to say that if the case stood now upon the admission of the libel, I should have stopped the suit *in limine*, or ordered the libel to be reformed. But my predecessor having admitted this libel, I feel myself bound to give it the largest construction, so as to admit evidence of the circumstances which prevented the vessel from coming to Quebec, and which may be considered as having determined the promoter's contract. The chartering of the vessel at Malbay, for a new voyage soon after her arrival there,—the absence of any plea of desertion,—the length of time which has elapsed since the arrival of the vessel at Malbay,—the production of the protest by the owners,—and the breaking bulk at Malbay, and landing of the cargo, or a portion of it,—establish beyond controversy

that the voyage homeward ended at Malbay, and that the promoter was, therefore, justifiable in leaving the ship there.

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The claim of the promoter for wages from the time of his leaving the vessel down to the day of bringing this suit, is clearly not admissible. Under no circumstances could he claim more than compensation for the injury which he has sustained by his discharge: which compensation the Admiralty would in the proper case award in the shape of wages (*a*). There is, however, a total absence of evidence of the promoter's having suffered any damage by his discharge. We do not know how long he was kept out of employ, when he arrived at Quebec, nor how he has been employed in the intermediate time. Without information as to these facts, it is impossible for the Court to assess and award to him damages. If damage has really been suffered by this party in consequence of his discharge, evidence ought to have been offered thereof, and this Court cannot and ought not to supply it.

Then, as to the claim of the promoter for wages during the period of his actual service on board the vessel, that is, from the 5th June to the 18th October, 1834. This claim is resisted on the following grounds:—1. The insufficiency of the libel. 2. That the matter in controversy has been tried and determined, and the claim of the promoter rejected by a court of competent jurisdiction at Gaspé. 3. Gross and continued misconduct on the part of the promoter, during the time he was on board the ship, as detailed in the testimony of Mr. Le Moine. The first head of objection is already disposed of. On the second head, it is to be observed that the owners have not pleaded the judgment rendered in the Court at Gaspé as

(*a*) Abbott on Shipping, Part v., Ch. ii., s. 1, Story's Ed. 734; the Beaver, 3 Rob. 92; the Exeter, 2 Rob. 261; Emerson v. Howland,

1 Mason, R. 45; Parry v. The Peggy, 2 Browne's Adm. App. 533; Pothier, Louage des Matelots, No. 205.

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a *res judicata*. The plea of *res judicata* stands upon the same footing as the plea of prescription. Neither operates an extinguishment of the action *ipso jure*, but may by exception. The defendant not pleading the one or the other waives it (*b*). Such is the rule of law, and that rule is consonant with equity and justice. If the exception *rei judicate* had been pleaded, the promoter might have seen fit not further to have prosecuted his suit; or might have replied, setting forth grounds of nullity in the proceedings and judgment; or that there was no such record: whereas, in the absence of such plea, and without notice of this ground of defence, he might be taken by surprise, and debarred of his just defence to the plea. Again, there is no averment in the proceedings to which this evidence applies, either as affirming or controverting it. I do not, therefore, think myself at liberty to enter into the consideration of the nature and validity of the proceedings at law in Gaspé. A like objection exists as to the remaining ground, the owners not having pleaded misconduct on the part of the promoter. He has had no opportunity, nor has he been called upon, to controvert the accusation of misconduct (*c*). If misconduct had existed, the owners not setting it up as a defence, it must be taken that it was pardoned (*d*). Besides, nothing is better established than that where misconduct on the part of the mariner is set up as a defence to a claim of wages, not only must it be pleaded, but the pleading containing such defence

(*b*) Dig. Lib. 44, Tit. 2, De exceptione rei judicate; 2 Browne's Civ. & Adm. Law, 362; Vinnius, Comment. Inst. Just. L. 4, T. 13, s. 5; Toullier, Droit Civil. Tom. 10, Liv. 3, Tit. 3, Ch. 6, sec. 3, art. 1 er. No. 74; Goubeau, Traité des Exceptions, p. 414.

(*c*) See judgment of Lord Stowell, in the case of the Exeter,

2 Rob. 261.

(*d*) Miller v. Brant, 2 Camp. 590; Laws of Wisbuy, Art. 25; Laws of Oleron, Art. 13. See also cases cited in Abbott on Shipping, Part II., Ch. 4, s. 3. In a suit for wages, service and good conduct are to be presumed till disproved. The Malta, 2 Hagg. 166.

must furnish a specification of the acts of misconduct, with a proper degree of certainty (e).

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The services having been thus established, and no legitimate ground of defence shewn, I must award the promoter's wages during the period of that service. There is some difficulty as to the rate and quantum of wages. The promoter claims 5*l.* a month; Mr. Le Moine says, that to the best of his belief the sum in the articles was 4*l.* a month, and the credit for 4*l.* given in the promoter's account, would induce one to believe that this last was the true sum, as when advances are made to mariners at the inception of a voyage, the advance is usually of one month. The ship's articles are not produced by the owners, although they have been called upon to produce the ship's papers. The balance of wages claimed by the promoter at Gaspé, was 15*l.* 5*s.*, and I feel myself authorised to look at the record, merely as shewing what the promoter then stated his own claim at. Now, taking it as we must do, that the only sum received by him was 4*l.*, the rate of wages could not have been 5*l.* I shall therefore award him wages at the rate of 4*l.* per month, for the period of his actual service.

The only remaining question is as to costs. I must disclaim any discretionary power as to the awarding or refusing of costs, if by the term discretion is understood any thing depending upon arbitrary will, and not upon the proper legal construction of the statute as applied to particular cases, to carry into effect the intention of the legislature. I understand that discretion which the Judge of the Admiralty is called upon here to exercise to be the discretion which *Sir Joseph Jekyll* describes in referring to the discretion which courts of equity are said to exercise (f). "Though proceedings in equity are said

(e) *The Exeter*, 2 Rob. 263; first Circuit, p. 384.

Macomber v. Thompson, 1 Sum- (f) *Cowper v. Cowper*, 2 Peere-
ner's Rep. C. C. U. S. for the Williams, Reports, p. 753.

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to be *secundem discretionem boni viri*; yet when it is asked, *Vir bonus est quis?* the answer is, *Qui consulta patrum, qui leges juraque servant* (g). And as it is said in Rook's case, 5, Rep. 99 b., that discretion is a science, not to act arbitrarily according to men's wills and private affections: so the discretion which is to be executed here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other; this discretion in some cases follows the law implicitly, in others assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigor of it; but in no case does it contradict, or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. This is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with." Now, in the exercise of the discretion thus described, I do not feel that I can award costs to the promoter. It does appear to me that the promoter might have had as effectual a remedy for the recovery of his wages by complaint to a Justice of the Peace under the provision of the Stat. 5 & 6 W. 4. c. 19, s. 15, as he could have here. The motives which rendered necessary the establishment of this summary tribunal for the trial of seamen's suits, apply with multiplied force to ships lying at the out ports, remote from the actual seat of this Court. I shall, therefore, certify accordingly (h).

Davidson, for promoter.

Aylwin, contra.

(g) Hor. Epist. l. 16, v. 41.

(h) See the case of *The Brig William*, 2 W. L. 231.

Saturday, 22nd October, 1836.

PHŒBE—RALTRAY.

The court has no jurisdiction in cases of suits for pilotage, where there has been a previous judgment of the Trinity House, upon the same cause of demand.

JUDGMENT.—*Hon. Henry Black.*

This is a case of the first impression. The libel sets forth a contract between the promoter, a pilot, and the former master of the ship Phœbe, attached in this suit, for the piloting of this vessel from Quebec to Bic in the month of November, 1835. It further sets forth that after the making of this contract, the promoter had gone on board and entered into the service of the ship, but that the master, without good or sufficient cause, dismissed him from the same and employed another pilot, whereby the promoter was prevented from piloting other ships, and became entitled to the sum of 20*l.* currency, being the amount of pilotage justly due for the piloting of a ship of the description of this vessel from Quebec to Bic. The libel then proceeds to allege the institution of a suit in the Trinity House at Quebec by the promoter against such former master of the Phœbe, for a breach of this contract, and the recovery in the Trinity House, on the 17th of the same month of November, of judgment for the sum of 10*l.* currency and costs (a). This is followed by an allegation that since the arrival of the vessel in the present season, Mr. Dean the consignee of the vessel for and on behalf of the owners, had promised to pay this sum of 10*l.*

PHŒBE.

(a) As to the jurisdiction of the Trinity House, see Provl. Stat. 45, Geo. 3, c. 12, s. 18.

PROBE.

The case has been argued upon the motion on the part of the promoter for the admission of this libel, and the question is, whether the Court can entertain a suit *in rem* against a ship for services rendered to her by a promoter, as pilot, that promoter having previous to the institution of the suit in this Court, taken proceedings before the Trinity House for his pilotage, and having recovered judgment there for the same.

The jurisdiction of this Court in cases of pilotage is undoubted (*b*), and if the promoter had stopped at the end of the first article of his libel, the suit must have proceeded, leaving the defendant to plead the recovery in the Trinity House if he should see fit. But it appearing upon the face of the libel that such recovery has been had, the Court is called upon to determine whether the promoter is entitled to proceed in this Court and obtain a judgment therein anew upon the subject-matter of the judgment of the Trinity House or upon that judgment itself. I think the suit cannot be maintained. First: Not upon the original consideration of the pilotage; that original consideration is merged in the judgment of the Trinity House (*c*). A Court of competent jurisdiction having decided the facts set forth in this libel, which were directly in issue before the Trinity House, the party is estopped from trying those facts again (*d*). The rule of law is *nemo debet bis vexari pro eadem causa*. In this case the same allegations are made, and if the cause proceeded the same facts will be in issue as were in issue in the cause before the Trinity House (*e*).

(*b*) 2 Will. 4, c. 51, s. 6; the Nelson, 6 Rob. 227.

(*c*) Sparry's case, 5 Rep. 61; Ferrers's case, 6 Rep. 7, Cro. Eliz. 668. Hitchin v. Campbell, 2 Bl. 779, 831.

(*d*) Buller's Nisi Prius, 244;

Blackham's case, 1 Salk. 290; Rex v. Grondon, Cowp. 315; 1 Saund. 98; Com. Dig. "Action," (I).

(*e*) Putt v. Royston, 2 Show. 211.

PROBEE.

To allow two several suits for the same cause of action in two several Courts, would lead to a worse than useless multiplication of law suits, would be highly vexatious to parties, and would subject Courts to discredit from contrariety of co-existing decisions of equal authority in separate tribunals upon the same matters (*f*). "Opposite judgments would indeed be inextricable, as being flatly inconsistent; one of the Courts, for example, ordering a thing to be done, and the other Court discharging it to be done." Litispence on these grounds is held a good plea to an action (*g*). The party had his option to proceed for his pilotage either before the Trinity House, or before the Admiralty. He has made his option of the former, and by that he must abide as well in respect of the execution of the judgment, as in the obtaining of it.

Next as to the ground of action set forth in the second article of the libel founded upon the judgment in the Trinity House. If it be true that the original cause of action is merged in the judgment, and of this I apprehend there can be little doubt, then the inquiry comes simply to be, whether the Court of Admiralty can entertain an action founded upon the judgment of a particular Court, having concurrent jurisdiction with it, as to the subject-matter of such judgment; and whether such judgment can be made the foundation of proceedings *in rem*, in the Admiralty. No trace is, I believe, to be found of a suit founded upon the judgment of a domestic tribunal being brought or maintained in the Admiralty. If such a suit could be entertained, it must be founded on the judgment itself as a title or a security for money, which having none of the characters of a maritime contract, could not be tried or enforced in the Admiralty. In the

(*f*) Harg. Law Tracts, 447; (*g*) Sparry's case, 5 Rep. 61.
6 Rep. 9.

PROMER.

case of the *Picimento*, (h) execution was granted in the High Court of Admiralty, to enforce the judgment of a Vice-Admiralty Court, which had been abolished previously to the final execution of its sentence. But here the promoter can still obtain from the Trinity House, every remedy by way of execution, that he could at any time have had from that Court. If a judgment of the Trinity House could found proceedings *in rem* in the Admiralty, this Court would become subordinate and ancillary to the Trinity House, for the purpose of carrying into effect the judgments of that Court, which cannot be. The law in giving jurisdiction to the Trinity House, settled also the nature of the execution by which the judgment of that Court was to be enforced: and the party in making his option in that Court, made option at the same time of the remedy by execution to be had there. If the proceeding here could be maintained, the promoter would have the remedy by execution in the Trinity House; and that by attachment in the first instance, and execution afterwards of the ship *cumulative*: which remedies by execution might proceed concurrently in different forms, and against different subjects, out of two different Courts, altogether independent of each other, which might lead to great oppression and inconvenience (i).

Lastly. The promoter sets forth a promise on the part of the consignee of the ship to pay the amount of this judgment. Now, this is a personal promise by one not capable of binding the ship, made upon land for the payment of a debt of a third person. If this promise could be made the subject of any action, it could only have been of a personal action in the common law courts. But I presume that this last allegation is not set

(h) 4 Rob. 360.

(i) See *La Madonna della Lettera*, 2 Hagg. 289.

forth as a substantive ground of action, but as a fact in corroboration of the previously alleged causes of action. The libel is therefore rejected.

PHOEBE.

For Promoter, *Aylwin*.

Gairdner, contra.

In *Moses v. Macferlan* (2 Burr. 1005), Lord Mansfield said, "the merits of a judgment can never be over-haled by an original suit, either at law or in equity. Till the judgment is set aside or reversed, it is *conclusive*, as to the subject matter of it, to all intents and purposes."

Wednesday, 26th October, 1836.

JOHN AND MARY—MARSHALL.

Since the passing of the Act of the Imperial Parliament, 2 Will. 4, c. 51, the establishment of fees, in the Vice Admiralty Court here, is exclusively in the king in council; and the table of fees established under this statute having been revoked, without making another, it is not competent to the Court to award a *quantum meruit* to its officers.

JOHN AND
MARY.

Soon after the promulgation in Lower Canada, of the order in council of the 27th June, 1832, framed under the Act of the Imperial Parliament, 2 Will. 4, c. 51, considerable difficulty was manifested at the table of fees established by it in the Vice-Admiralty Court at Quebec. After a careful inquiry into the grounds of this discontent, Lord Glenelg, the Secretary of State for the Colonial Department, recommended to the Lords Commissioners of the Treasury, the revocation of that order, in so far as related to the establishment of a table of fees in the Vice-Admiralty Court at Quebec. This was effected by an order in council, dated the 20th of November, 1835, which was proclaimed in Lower Canada, on the 4th of February, 1836. It had been Lord Glenelg's understanding that the revocation of the order of the 27th of June, 1832, would revive the system previously existing. It appeared, however, that the acting Judge of the Vice-Admiralty Court took a different view of the case, and on the revocation of the order of the 27th of June, 1832, established a scale of fees for the officers of the Court, on a principle of equitable remuneration for services performed. This arrangement continued in force until the 21st of September, 1836, when on the appointment

of another judge, it was abandoned; and from that time no regular remuneration existed for the officers. The question in this case was, whether the table of fees established by the order in council of the 27th June, 1832, having been revoked and annulled by the order in council of the 20th of November, 1835, without substituting any new table of fees in lieu of the one so annulled, the Court could allow what might be considered reasonable fees for services performed by the officers. The opinion of the Court, after hearing counsel, was as follows:

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JUDGMENT.—*Hon. Henry Black.*

The case now before the Court, inconsiderable as is the amount to which it relates, involves a question of very great magnitude, being whether the table of fees to be allowed to the officers of the Court of Vice-Admiralty in Lower Canada, established under the authority of the Act of the Imperial Parliament, to regulate the practice and the fees of the Vice-Admiralty Courts abroad, and to obviate doubts as to their jurisdiction (*a*), having been revoked and annulled by an order of the King in Council of the 20th of November, 1835, without substituting any new table of fees in the place of that so annulled, under this Act, it is competent to the Court to allow what may be considered reasonable fees by the Court, for the labour and attendance of the officers thereof. Since the revocation of this table of fees, and during the present season, my predecessor has allowed fees to the officers of the Court for their labour and attendance as a *quantum meruit, pro opere et labore*. I should have been glad to find that the Court had the power to make an allowance of this nature to its officers, for it would certainly be a great hardship that they should be obliged to give their time, skill, and labour without being entitled to demand a compensation therefor; but after the most careful and

(*a*) 2 Will. 4, c. 51.

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anxious investigation of the subject that I have been able to make, I am led to the conclusion that the Court has not the power to sanction such allowance (b). By the ancient law of England, none having any office concerning the administration of justice could take any fee or reward for the doing of his office but of the King (c); and the general rule is that they cannot take any more for doing their office than has been allowed to them by Act of Parliament or by immemorial usage. This principle relative to fees is but a consequence of the more general rule, *Nullum tallagium vel auxilium, per nos vel per hæredes nostros, in regno nostro, ponatur seu levetur, sine voluntate et assensu, archiepiscoporum, episcoporum, comitum, baronum, militum, burgensium et aliorum liberorum communium de regno nostro* (d), and is so considered by my Lord Coke, who says that within this Act are new offices erected with new fees, or old offices with new fees, for that is a tallage put upon the subject, which cannot be done without the common assent by Act of Parliament (e). It is, however, said by *Hawkins* that it cannot be intended to be the meaning of the statute to restrain the courts of justice, in whose integrity the law always reposes the highest confidence, from allowing reasonable fees for the labour and attendance of their officers; for, the chief danger of oppression, he adds, is from officers being left at their liberty to set their own rates on their labour, and make their own demands; but there cannot be so much fear of these abuses while they are restrained to known and stated fees, settled by the discretion of the Courts, which will not suffer them to be exceeded without the highest resentment (f). Without here examining minutely this

(b) See the Sentence of Dr. 2 Inst. 176, 208, 209.

Croke in the case of the Hiram, (d) St. 34 Ed. I.

Stewart's Vice-Admiralty Rep. (e) 2 Inst. 533.

587. (f) *Hawkins's Pleas of the*

(c) St. W. 1; 26 Co. Litt. 368; Crown, B. 1, ch. 68, s. 3.

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authority from *Hawkins*, I may say that if there had been no statutory provision whatever relating to fees in the Vice-Admiralty Court here, I should have considered whether I might have allowed reasonable fees to the officers in the nature of a *quantum meruit*. But, since the passing of the before-mentioned statute, I do not conceive that such power belongs to any of the Vice-Admiralty Courts. The power of establishing tables of fees seems to me to be wholly and exclusively vested in the King in Council. By the first section it is provided that it shall be lawful for His Majesty, with the advice of His Privy Council, from time to time, to make, ordain, and establish tables of fees to be taken and received by the judges, officers, and practitioners in the said Courts, for all acts to be done therein; and also from time to time, as shall be found expedient, to alter any such fees, and to make any new table or tables of fees; and by the third section, "that the several fees so to be established, and no other, shall from and after the making and establishment thereof, and the entry and enrolment thereof, as aforesaid, be deemed and taken to be the lawful fees of the several judges, officers, ministers, and practitioners of the said respective Courts, and such fees only shall and may be demanded, received and taken accordingly." It is to be observed that in the year 1809, the Provincial Ordinance, 20 Geo. 3, c. 3, regulating the fees of the Courts generally, and amongst them of the Court of Vice-Admiralty, having long expired, the then judge of the Court of Vice-Admiralty established of his own authority a table of fees regulating as well his own fees as those of the officers of the Court. The legality of this table having been questioned, and complaints made of the fees established therein as unreasonably large, the statute in question was passed, whereby the intention of the Imperial Legislature appears to have been to prevent the recurrence of similar inconveniences, by vesting the

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power of regulating the fees in His Majesty, with the advice of His Privy Council. The object of the statute would, it seems to me, be entirely frustrated, if this Court were to intermeddle by giving a *quantum meruit* to the officers of the Court for particular services rendered by them in their offices. Fees settled as a *quantum meruit* by the Court are as much fees as those established by statute, and fall, therefore, within the above prohibition. All fees of office, properly so called, are presumed to have a legitimate foundation in some act of a competent authority, originally assigning a fair *quantum meruit* for the particular service (*g*). Where the fee is established by or under the authority of an Act of Parliament, the statute is conclusive as to the *quantum meruit*. Where settled by the authority of the Court, the subject is not concluded thereby, but may try the reasonableness of the sum claimed as a *quantum meruit* before a court of competent jurisdiction (*h*), and obtain the verdict of a jury thereon, when, and when alone, they become established fees (*i*). If then this Court were to assign what it might consider a reasonable *quantum meruit* to the promoter here, as and for costs of contumacy to be paid to his proctor, and to the officers of the Court for their services in this cause, the amount of these costs would be fees, not established under the authority of the foregoing Act, and would fall directly within the prohibition contained in the third section of that Act; and if the Court could exercise such a power in this particular case, it would be called upon to exercise a like power in respect of every service performed by the several officers of this Court in the ordinary discharge of their several duties. Out of which would grow a table of the usual fees of the Court,

(*g*) See opinion of Lord Stowell in the case of the *Rendsberg*, 6 Rob. 145.

(*h*) Viner, *Abr. Fees*, E. 4, 5,

and by Holt, C. J., 12 Mod. 609.

(*i*) Gifford's case, 1 Salk. 333, Hardr. 351.

not virtually distinguishable from a table of fees to be taken and received by the officers and practitioners of the Court for all acts to be done therein, established by the authority of the Court, *uno flatu*, which would be, in the view I take of the subject, an usurpation of a power which the Imperial Legislature has vested in His Majesty, to be exercised with the advice of His Privy Council; and might, besides, have the effect of introducing anew all those inconveniences which it was the object of this provision of the statute to remedy. In coming to this conclusion, the feelings which it would otherwise produce are mitigated by the consideration that the officers of the Court have a claim for relief upon the justice of His Majesty's government, which cannot fail to receive every proper attention (k).

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MARY.

(k) Salaries were accordingly assigned to the officers, to be computed from the 21st of September, 1836.

The question as to the effect of the order in council, of the 20th November, 1835, on the system under which the officers of the Court were remunerated, was afterwards submitted by the Secretary of State for the Colonial Department to the law officers of

the Crown in England (now Lord Chief Justice and Lord High Chancellor), whose opinion, given 17 May, 1837, was as follows:

"We are of opinion that the Judge of the Vice-Admiralty Court is not invested with authority to establish such a table of fees.

"J. CAMPBELL,
"R. M. ROLFE."

Thursday, 27th October, 1836.

NEWHAM—ROBSON.

NEWHAM.

Practice. The Court will require the libel to be produced at a short day, if the late period of the season, or other cause renders it necessary.

Per Curiam.

This case turns entirely upon a question of practice, but a question involving important consequences, and to which I have accordingly given my particular attention. It is of the last degree of consequence, that in seamen's suits the least delay should be incurred that is consistent with the due and proper examination and adjudication of them (*a*). The rules and regulations made by His Majesty in Council for the guidance of this Court (*b*), seem to me consistent with all proper expedition in the conduct of seamen's suits. Under these regulations, the action having commenced by an entry in the Action Book (*c*), it is competent for the master voluntarily to appear, with or without bail, the vessel in the last case remaining under arrest (*d*). The appearance entered, the defendant is entitled to an assignation on the plaintiff to exhibit a libel within a time to be limited by the Judge (*e*). In the

(*a*) All admiralty suits in the British courts are summary causes, and justice is administered *levato velo*. Clerke's Prax. Tit. 19; 2 Bro. Civ. & Ad. Law, 413.

Ubiunque litis causa conveniuntur, non diu detinendi sunt, nec longum litis sufflamen permittendum, sed quam brevi potest temporis spatio, causa maturanda ob navigandi necessitatem, cujus

periculum est in mora. Cæsar, L. 1, Bel. Gal., *Res maritimæ celerem et instabilem motum habent*. Loccenius, Ins. Marit. Lib. 3. ch. 10, s. 2.

(*b*) 27 June, 1832.

(*c*) Rules and Regulations, § 7.

(*d*) Ibid. § 9.

(*e*) Ibid. § 12. See also Oughton's Ordo Judiciorum, Tit. 54, s. 2; Clerke, Praxis Supremæ Curie Admiralitatis, Tit. 11.

exercise of a legal discretion, and considering the season of the year, the Court in this case, on the 25th instant, assigned the following day at eleven o'clock, for the plaintiff to exhibit his libel. The simplicity of seamen's suits generally, appears to the Court to be such as to render the time allotted sufficient; all that is required in the libel being to state the hiring, rate of wages, performance of the service, determination of the contract, and the refusal of payment (*f*). If the plaintiff, however, had any grounds to claim an extension of this time, and had made an application supported by affidavit, the Court might have extended the time (*g*). In the absence of such special ground, the Court cannot do otherwise than dismiss the defendant from this cause (*h*).

NEWHAM.

(*f*) Rules and Regulations,
§ 15.

(*g*) Oughton's *Ordo Judiciorum*,
Tit. 55, s. 2.

(*h*) Ibid. Tit. 56, s. 2; Browne's
Civ. and Adm. Law, 410; Rules
and Regulations, § 38.

CLANSMAN,—SCOTT.

Per Curiam.

This case being in the same situation as the last, the same judgment must be entered.

CLANSMAN.

Wednesday, 2nd November, 1836.

FRIENDS—DUNCAN.

FRIENDS.

An attachment awarded against a master for taking out of the jurisdiction of the Court his vessel, which had been regularly attached.

Per Curiam.

The master appears to have taken the vessel out of the jurisdiction of the Court, after she had been regularly attached on the 3rd of July last, which is a direct contempt against the authority of the Court (*a*). In a case like the present one, if the Court had not the power of vindicating its authority, its process would become nugatory, and its jurisdiction annihilated. The party is therefore entitled to a monition on the master to shew cause why an attachment should not issue for a contempt (*b*).

(*a*) *Rigden v. Hedges*, 1 Lord Raymond's Reports, p. 446; 1 C. Rob. 332; *Enoch Stanwood's case*, Stewart's Nova Scotia V. A. Rep. 123.

(*b*) *Oughton, Ordo Judiciorum* — De contemptu, Tit. xxx.; Tom. 1, p. 57; *Clerke, Praxis Supremæ Curie Admiralitatis*, Tit. 68, in fine.

FRIENDS—DUNCAN.

Practice. On return of a warrant, first default made, but no prayer for a second default at the expiration of the two months from the return of the warrant: proceeding discontinued thereby.

FRIENDS.

Per Curiam.

Upon the return of the warrant in this suit on the 5th of July last, the parties cited not appearing, an entry of the first default was made. It would have been competent to the promoter, at the expiration of two months from the return of the warrant, to have had the parties again pronounced in default (a), but the promoter does not appear to have prayed for a second default, at the time and in the manner prescribed by the regulations. If the Court could now grant a second default, it might do so for any indefinite period of time after the entry of the first default. It is true that it is said the master removed the ship out of the jurisdiction of the Court between the first default and the expiration of the two months, but this did not prevent the promoter from obtaining a second default; and it may be that the law gives a special remedy against the ship in consequence of the rescue (b). This, however, is not before the Court upon the present application; the sole question is, whether in the ordinary course of the practice of the Court, it is competent to the promoter to obtain the second default at any time he sees fit beyond the period of the two months fixed by the rules

(a) Rules and Regulations,
§ 10.

(b) If a ship be arrested by process out of the Admiralty Court, for a matter arising within their jurisdiction, though she be

rescued at land, the consuance of the rescue belongs to the Admiralty, otherwise not. Per Holt, Chief Justice, 1 Lord Raymond's Rep. 446.

FRIENDS.

and regulations. Under the old practice the certificate of the execution of the warrant was regularly continued to four successive defaults, with certain intervals between (c): by the new rules and regulations two of these are dispensed with, and the continuance is operated by the rules and regulations without a formal rule to that effect. It is, however, not less a continuance, and the party can only be cited, as it appears to me, on the day to which the cause is continued: *non constat* that he was not in attendance on that day, and not being cited he would have a right to consider the promoter did not intend to proceed to a *primum decretum*. I cannot, therefore, pronounce the parties cited in default.

(c) Clerke, *Praxis Curie Adm.* Tit. 31, 35; Browne's *Civ. & Ad. Law*, ii., 399.

Tuesday, 8th Nov. 1836.

CUMBERLAND—TICKLE.

COLLISION.—Owners of vessels are not exempted from their legal responsibility, notwithstanding that their vessel was under the care and management of a pilot.

CUMBERLAND.

Vessel giving a foul berth to another vessel, liable in damages for collision done to the vessel to which such foul berth was given by her, although the immediate cause of the collision was a *vis major*, and no unskilfulness or misconduct was imputable to the offending vessel after giving such foul berth.

This was a case of collision brought by the owners of the brig Cornwallis against the brig Cumberland. The libel pleaded that on the 5th of October last, the Cornwallis, a brig of 231 tons, arrived at the quarantine station at Grosse Isle, with a very heavy gale blowing from the eastward, and brought up at about half after ten in the forenoon, and cast her small bower anchor, and afterwards let go her best bower anchor; that the brig Cumberland arrived at the same quarantine ground between the hours of eleven and twelve of the same day, and let go her anchor right a head, and to the windward of the Cornwallis there being at the time much more than sufficient sea room on either side of the Cornwallis, for the anchoring of the Cumberland without danger to either vessel: that about ten minutes afterwards the Cumberland let go her second anchor, which brought her very near to the Cornwallis, the wind continuing to blow from the eastward, and gave a foul berth to the Cornwallis; that on the same day the Cumberland drove upon the Cornwallis, her anchor stock catching fast hold of the chain cable of the small bower anchor of the Cornwallis slipped up to her bows, came into collision with the

CUMBERLAND. Cornwallis, and passed her, was brought up by the anchor stock catching as above, and by the sudden jerk broke the large bower anchor chain cable of the Cornwallis, and did various other injuries to the Cornwallis specified in the libel; which collision and injury it was alleged proceeded from the inattention or want of skill of the persons on board of the Cumberland.

On the part of the owners of the Cumberland it was pleaded in their responsive plea, that she anchored at the quarantine station 't Grosse Isle on the 5th of October, at about eleven in the afternoon, letting go the starboard bower anchor, and veering about forty fathoms chain, and then let go the larboard bower anchor veering out thirty fathoms, and paying out at the same time thirty fathoms more of the starboard anchor, then riding with the anchors down, the gale increasing in violence, shortly after sent down the top-gallant yards; that the Cumberland thus rode out that flood, the following ebb, and a part of the next flood till about half past ten of the clock in the afternoon, the gale then blowing a perfect hurricane, the starboard chain cable broke, and the strain then coming entirely on the larboard bower anchor, drew the fluke of that anchor straight, thereby rendering it useless, when the Cumberland was driven foul of the Cornwallis, and driving before the wind and tide, the stock or straightened fluke of the Cumberland's anchor came in contact with the Cornwallis's chain and slipped up to the bows of the Cornwallis. This was followed by an allegation that the collision did not occur through the inattention, neglect, or want of skill of the commander and crew of the Cumberland, but on the contrary, that the commander and crew thereof used every exertion in their power to prevent the said collision, and to protect the Cornwallis against all damage and loss.

The case was argued by Mr. Okill Stuart for the Cornwallis, and Mr. Duval, K. C., for the Cumberland.

JUDGMENT.—*Hon. Henry Black.*

CUMBERLAND.

The facts do not appear to admit of doubt; indeed there is no essential difference between the material facts as stated by the parties in their several pleadings or by their witnesses. The Cornwallis being anchored at Grosse Isle, the Cumberland arrived at that station with a strong easterly wind and a flood tide, and anchored to the windward of the Cornwallis, at a distance of between sixty and seventy fathoms. These vessels rode out the remainder of the flood tide, the following ebb tide, and a portion of the next flood tide, the wind continuing to blow from the eastward, and increasing in violence. At the end of about ten hours from the anchoring of the Cumberland, at about half after ten in the night, the starboard chain cable of the Cumberland broke, and the whole stress of the ship coming upon the larboard anchor, straightened the fluke of it, and the Cumberland drove foul of the Cornwallis. The Cumberland driving before the wind and tide, the stock or fluke of her anchor hooked the Cornwallis's chain cable, ran up to the bows of the Cornwallis, and the collision complained of then took place. In cases of collision, the collision and damage may arise from the fault or misconduct of the vessel suffering from the collision: or the accident may have happened from unavoidable circumstances, without fault on the part of either vessel; or both parties may be to blame, as where there has been a want of skill or due diligence on both sides: or the loss and damage may be owing to the fault or misconduct of the vessel charged as the wrong doer. In the two first cases no action lies for the damage arising from the collision. In the third case the law apportions the loss between the parties as having been occasioned by the fault of both of them. In the present case, the question is whether there was fault or misconduct on the part of the Cumberland, and

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that question seems to depend upon whether, according to the rules and practice of navigation, the master of the Cumberland was justified, under all the circumstances, in bringing the Cumberland to anchor at the place and in the manner which he did, respect being had to the situation and anchorage occupied by the Cornwallis when the Cumberland was brought to anchor. If there were misconduct or want of proper care and prudence in the master of the Cumberland in anchoring that vessel in the place he did, and her being so moored caused the accident, then the Cumberland is answerable in damages for the collision, although it may have proceeded immediately from the irresistible violence of the wind and waves. For, if the collision be preceded by a fault, which is its principal or indirect cause, the offending vessel cannot claim exemption from liability on the ground of the damage proceeding from inevitable accident, the rule being *quando culpa præcessit casum tunc casus fortuitus non excusat*. But, if on the other hand there was no want of proper nautical skill and discretion in so anchoring this vessel, the collision must be considered as having arisen from a *vis major*, for which the Cumberland is not answerable. To enable the Court to come to a decision upon the case, it is necessary that a correct opinion should be formed upon the following questions, which are of a nautical character:—1. Whether, previous to and at the time of the occurrence of the accident, the Cumberland was properly moored and anchored, relation being had to the situation of the Cornwallis, and the state of the wind and tide, at the time when the Cumberland was so moored and anchored? 2. Whether the accident arose from unavoidable circumstances, without fault being attributable to either of the ships or their masters, or whether it proceeded from the fault of either of the said ships or their masters, and if so, from which of them? Availing myself of the power which this Court has to refer to some

gentleman conversant in nautical affairs, I have obtained the assistance of a captain in the Royal Navy, now engaged in an important public service here, upon whose judgment and opinion I shall feel it my duty to rely.

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Captain BAYFIELD (a), who had examined the evidence and heard the arguments and observations of the counsel in the cause, then delivered the following written opinion:—Having deliberately weighed all the circumstances bearing upon this case as set forth in the evidence on either side, the following is my conscientious opinion thereon, and the grounds upon which it has been formed:—1. In answer to the first question submitted to me, or as having relation to it, I must remark, that since the Cumberland's anchors did not drag by reason of the badness of the anchoring ground, but, on the contrary, one cable parted and the other anchor became straightened, whilst the Cornwallis's single anchor and chain cable subsequently bore the strain of the vessels, there is strong reason to infer that the cables and anchors of the Cumberland were not sufficient, but they might have been imperfect unknown to the master or owners, since it does not appear in evidence that they were less than the established size for vessels of her tonnage. I am of opinion that the Cumberland did not give the Cornwallis what is technically termed "a foul berth," since it appears upon evidence that she was so anchored as to allow sufficient room for the vessels to swing clear of each other. But, on the other hand, I am of opinion, and I believe it to be a generally received opinion among seamen, that it is imprudent and improper to anchor directly a-head or directly astern of another vessel, in the direction of the tides or prevailing winds, unless at such or so great a distance as would allow time for either vessel to take measures to avoid collision in the event of

(a) Now Rear Admiral Bayfield.

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either driving from their anchors. It is, moreover, the usual practice not to anchor near to and directly in another vessel's hawse, that is, directly a-head and in the direction of the wind and tide, as the Cumberland did in relation to the Cornwallis, and in books which treat on seamanship it is mentioned as a thing to be avoided, not only to prevent accidents from driving in bad weather, but also in order that either vessel may be able to get under weigh without risk of collision with the other. Now, at Grosse Isle, there are no winds which could endanger a vessel excepting those which blow directly up or directly down the river, in or very nearly in the direction of the tides, and these are well known to be prevailing winds. I therefore consider that it would have been wrong to anchor the Cumberland in the position which she occupied in relation to the Cornwallis at any time; but under the circumstances in which the Cumberland anchored, at or near the commencement of an easterly gale, in the month of October, I conceive it to have been highly incautious and imprudent in the pilot of that vessel to have anchored her in the position which he did previously to the collision; and in so far as there was not due precaution and prudence exercised by the pilot, I conceive that the Cumberland was not properly moored and anchored. 2. In answer to the second question, That the Cumberland was anchored directly a-head of the Cornwallis in the direction of a strong wind and flood tide, and so near as not to allow of time for any measure to be taken to avoid collision in the event of her driving or parting from her anchors, either on her own part or that of the Cornwallis, is, I think, fully substantiated by the evidence. That she was anchored, as alleged, directly a-head, and in the direction of the wind and tide, is moreover proved by the circumstance of her anchor hooking the chain cable which the Cornwallis was riding by. I do not, therefore, think that the accident

arose from unavoidable circumstances, since a common degree of prudent precaution, on the part of the pilot of the Cumberland, would have prevented its occurrence. The master of the Cumberland appears in evidence to have admitted that it was improper to have anchored where he did, and to have told the pilot to anchor further out. How far the master of the Cumberland is legally answerable for the acts of the pilot, or whether he be answerable at all, it is not for me to decide, but as it is generally considered that the pilot has the sole charge of the vessel, and that the master cannot take the charge out of his hands without risking the insurance, I am of opinion that the fault is imputable to the pilot of the Cumberland alone.

The COURT.—Captain Bayfield exempts the master from blame, and attributes the fault which gave occasion to the damage to the pilot; but, so far as the present suit is concerned, it is immaterial whether the fault be with the master or with the pilot. It is settled law that when collision takes place in consequence of the fault of the pilot, the ship doing the wrong is not the less answerable for the collision. I esteem myself particularly fortunate in having had such assistance upon the present occasion, and adopting the opinion of Captain Bayfield, I decree in favour of the Cornwallis, and assess the damages at 63*l*. 12*s*. 9*d*.

NOTE.—Upon Captain Bayfield's making his report, and it being read in the presence of the counsel, the Court observed to Mr. Duval, the counsel for the Cumberland, that it appeared from Captain Bayfield that the damage had arisen, not from the fault of the master, but from that of the pilot, and asked him whether he wished to be heard upon that point. The counsel for the Cornwallis (Mr. Stuart), referring to the case of the Neptune the

CUMBERLAND. Second (a), the counsel for the Cumberland said that he acquiesced in the law of that case, and admitted that the ship was answerable for the act of the pilot, upon which judgment was given accordingly. The case of the *Neptune* the Second occurred shortly after the passing of the Statute 52 Geo. 3, c. 39, and the judgment of Lord *Stowell* appears to have been founded upon the ancient law, as it originally stood unaltered by any legislative enactment. The 6 Geo. 4, c. 125, repealing the statute 52 Geo. 3, c. 39,—which was also a consolidating Act, and contained some general provisions,—exempts the owners from all liability for loss or damage arising from the neglect, default, incompetency, or incapacity of the pilot. The words of the Act 6 Geo. 4, c. 125, s. 55, are these: “No owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever from, or by reason or means of, any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of this Act.” It makes it obligatory upon the master in all cases to take a pilot, and subjects him to a certain penalty in default of doing so. The provincial statute 45 Geo. 3, c. 12, s. 13, provides “that if the master of any ship or vessel coming to the harbour of Quebec, not having on board a branch pilot, shall refuse to receive on board and employ any branch pilot who shall offer to go on board and serve as such, in the river St. Lawrence, the master of such vessel shall pay to such branch pilot, who shall have so offered himself, half pilotage to the harbour of Quebec, from the place at which such pilot shall have so offered.” This is the only clause in the provincial statute, relating to the duty of the master as to receiving a pilot, and it

(a) 1 Dods. Adm. Rep. 467.

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contains no clause similar to that of the 55th section of the English Pilotage Act, 6 Geo. 4, c. 125, or of the 30th sect. of the repealed Act, 52 Geo. 3, c. 39. In the case of *Fletcher v. Braddick* (b), it was decided that if a ship be chartered to the Commissioners of the Navy, as an armed vessel, and an injury be done to another vessel by the misconduct of the persons on board of the former, while a commander of the navy and a King's pilot are on board, an action for the injury may be sustained against the owners of the chartered ship. If the circumstance of there being a pilot on board had been a good defence, it would not have been overlooked there. The next case in the order of time, after the case of the *Neptune* the Second, was that of *Carruthers v. Sydebotham* (c). The decision in this case, which was for the plaintiff against the underwriters, appears to proceed upon two principles; 1st. that the master being obliged to take the pilot under a penalty, the acts done by the pilot were to be considered as the acts of the pilot himself, and not of the master; and 2ndly, that the act of the pilot could not prejudice the assured, as the Pilot Act obliges all vessels, under a penalty, to take the first pilot who presents himself and his license (d), and such pilots are said to have the charge of ships while in the river (e), and as it was specially provided by the 52 Geo. 3, c. 39, s. 30, "*that no owner or master of any ship shall be answerable for any loss, nor be prevented from recovering upon any contract of insurance by reason of any neglect, default, &c., of any pilot taken on board under any of the provisions of that Act.*" The controversy was between the insurers and the insured upon a personal contract, and the question was whether the act producing the damage was an act of the assured by his servant, or a peril of the sea. There was privity of contract between

(b) 2 N. R. 182 E.; 46 Geo. 3.

(d) 37 Geo. 3, c. 71, s. 24, 37.

(c) 4 M. & S. 77, E.; 55 Geo. 3.

(e) Sect. 36.

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the parties, here it was tort between entire strangers, and the question was whether the loss should be incurred by the ship absolutely without blame, or by the ship producing the damage by the fault of its pilot. The provincial statute imposes no penalty upon the master for not taking a pilot; it merely subjects him to half pilotage dues. In the case of the *Neptune the Second*, as well as in the case before the Court, the proceeding was *in rem*. The case of *The Attorney General v. Case (f)* turned principally upon the question whether the 30th section of 52 Geo. 3, c. 39, extended to and embraced acts of pilots done under the Liverpool Local Act. Lord Chief Baron *Thompson*, in pronouncing the judgment of the Court, says expressly, "there were several cases quoted in which the masters and owners have been held liable, though in point of fact there had been a pilot on board; but those were cases prior to the 52 Geo. 3." It is to be observed, that the Liverpool Pilotage Act, which came under the consideration of the Court, in the last-mentioned case, contains a clause similar to the above clause in the provincial Act; and upon the construction of the clause in the Liverpool Local Act, Lord Chief Baron *Thompson* says, "in short, this Act imposes no penalty on the master, even for going to sea without a pilot, but only renders him liable to pay the wages which the pilot would have been entitled to, if he had thought fit to accept his services: now there is a penal clause in the 52 Geo. 3, &c." The judgment in that case was for the Crown. The case of *Bennet v. Moita (g)*, which was an action against the master, turned entirely upon the construction to be given to the aforesaid 30th section of the general Pilotage Act; and the case of *Ritchie v. Bowsfield (h)* turned also upon the construction of the same clause, in an action against the master. Several of the foregoing actions are actions on the case,

(f) 3 Price 302; 57 Geo. 3.

(h) 7 Taunt. 309; 57 Geo. 3.

(g) 7 Taunt. 258 H; 57 Geo. 3.

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the gist of which is negligence or misconduct in the defendant or his servants within the scope of their duty. The authority of the case of the *Neptune the Second*, has been questioned only with reference to the 30th section of the 52 Geo. 3, which is not noticed by Lord Stowell. The liability of the master can only arise from his own act or default, that of the ship seems to arise from the act of the ship, without reference to the person or persons in the ship from whose fault it may proceed. The principles which regulate the action upon the case do not seem to apply to a proceeding *in rem*. It is laid down in Browne (i) that proceedings *in rem* take place "in actions for collision, where there is no pretence for making the owner answerable or demanding reparation, as against him beyond the value of the ship" (k). That the English cases are based upon the special provision of the English Pilotage Acts, is stated by Bell (l), one of the most profound writers on commercial law, who, at the same time that he refers to those cases, refers to the case of the *Neptune the Second*, as settled law. On referring to American authorities we find that it was decided by the Supreme Court of Pennsylvania in *Bussy v. Donaldson* (m) that the owner of a ship doing damage to another is liable, though the ship was in the charge of a pilot. Chancellor *Kent*, in his *Commentaries* recognizes the same principle (n), and such is plainly the opinion of another distinguished jurist, in his notes to Lord *Tenterden's* *Treatise on Shipping* (o).

(i) Civ. & Adm. Law, ii. 397.

(k) For against the master, according to Bynkershoek there is remedy *in solidum*, and beyond the value of the ship.

(l) Bell's Com. 583.

(m) 4 Dallas, 206.

(n) Vol. 3, p. 135.

(o) Mr. Justice Story's edition of the work, Part II., ch. vii., s. 8, in notes.

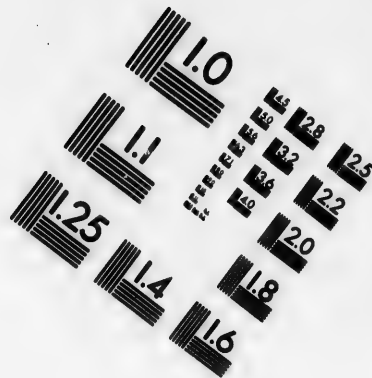
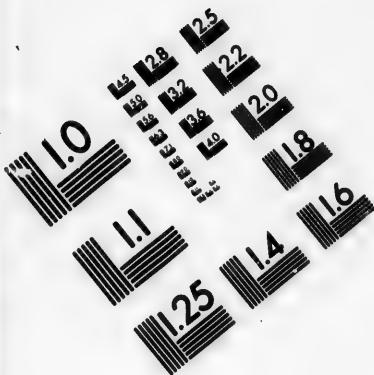
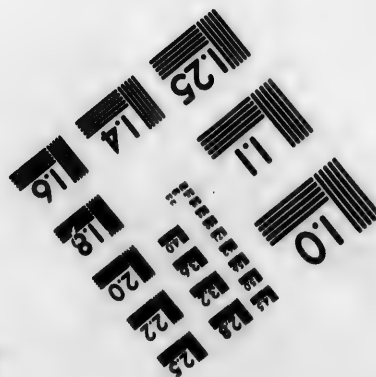
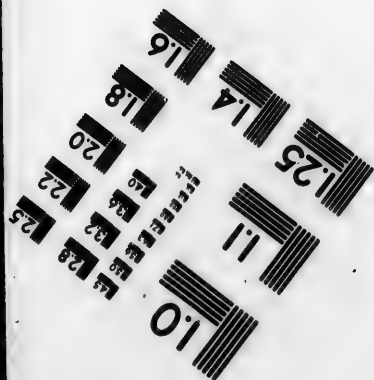
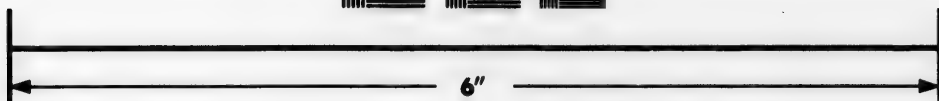
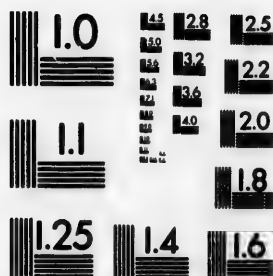


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Tuesday, 8th November, 1836.

SARAH—SINCLAIR.

SARAH.

Application for an attachment for contempt for resisting the process of the Court rejected; the statement of the officer being controverted by the affidavits of two other persons present at the arrest.

Per Curiam.

In this case the motion for an attachment for contempt against Daniel Sinclair, the master of the Sarah, is founded upon the affidavit of John Tolland, who was employed by the marshal of the Court to execute the warrant of personal attachment against him, and who swears that upon his going on board the Sarah to execute the warrant on the 5th instant, Sinclair violently assaulted him, threatened to shoot him, and struck him, using various opprobrious terms towards him and towards this Court, and refusing to obey the tenor of the warrant. The charge contained in this affidavit is of a grave character, and would, if supported, have called for adequate punishment (a). The Court is bound to support its officers in the discharge of their duty, and will not fail upon all proper occasions to do so. But here the facts set forth in the affidavit of Tolland are directly contradicted in the affidavit of Sinclair, corroborated by the affidavits of the mate, and of the carpenter of the ship. The rule for an attachment must therefore be discharged.

(a) Clerke, *Prax. Cur. Adm. Tit. 68*, in fine.

Tuesday, 8th November, 1836.

SARAH—SINCLAIR.

Steward displaced and punished without cause is not bound to serve as cook, and may recover his wages.

SARAH.

Demand for watch, &c., taken by the master from the seaman's chest may be joined to the demand for wages.

JUDGMENT.—*Hon. Henry Black.*

The promoter shipped as steward on board the Sarah, whereof the defendant is master, on a voyage from Liverpool to Quebec and back to a port of discharge in Great Britain. Three weeks or a month after the vessel went to sea, the master, being dissatisfied with the manner in which the promoter discharged his duty as steward, displaced him, and put him out of the cabin, making him do the duty of cook and some of the duties of an ordinary seaman. After the promoter was so displaced the defendant inflicted punishments upon the promoter without adequate cause, and which would have been excessive and unwarrantable if cause for punishment had existed. It will be the duty of the Court to examine the evidence relating to this part of the subject more particularly in another action now ripe for judgment in this court, between the same parties, wherein the promoter claims damages for the acts of violence which in this suit are set forth as grounds for his discharge. The power of the master to displace any of the officers of the ship is undoubted, but he must be prepared to shew that he had lawful cause for so doing. In this case there is no evidence to shew such misconduct or neglect of duty, or insufficient discharge of duty on the part of the promoter, as to justify the defendant in displacing him. But, even if there had been sufficient reason for his

SARAH.

discharge from the office of steward, I do not think that he was bound to remain with the ship after her arrival at the first port of discharge. His contract is to serve as steward during the voyage, and the master discharging him from this duty, he is discharged from the ship and entitled to his wages, unless some cause of forfeiture be shewn, which is not set up in this cause. I shall therefore award wages.

Then, as to the demand in the promoter's libel for his watch, with the key and seal attached to it, bank notes and coin, which he alleges the defendant took out of his the promoter's trunk at sea, against his will, and refuses to deliver up to him. It is objected that this ground of action ought to be made the subject of a separate action, and cannot be joined with the demand for wages. To support this objection would be to encourage a multiplicity of actions, very repugnant to the simplicity which obtains in this Court in controversies of this nature. The demand for the seaman's chest and apparel is usually joined with the demand for wages, and I know no reason why the watch or money or other effects of the seaman in his chest, or which had ceased to be there by the act of the master, should be distinguished from the apparel which usually forms the sole contents of the seaman's chest. In decreeing the wages, I shall at the same time decree that the defendant do deliver up with the promoter's chest these goods and monies, which ought not to have been removed from it. (a)

(a) *The Louisiana*, 2 Peters, Ad. Rep. 268.

SARAH—SINCLAIR.

SARAH.

Ten pounds sterling damages decreed to a steward for assaults committed upon him by the master, without cause.

JUDGMENT.—*Hon. Henry Black.*

This is a suit for damages brought by the steward against the master, for various assaults alleged to have been committed by the latter on the former, on the high and open seas during the voyage of the Sarah to this port. It appears that the promoter, having shipped as steward, was, upon some dissatisfaction on the part of the master with the manner in which the promoter discharged his duty as steward, displaced from that office, turned out of the cabin, made to act as cook and to do duty before the mast. It was subsequent to his being so displaced that the several assaults complained of in the present suit occurred. The evidence relating to these assaults establishes that the defendant struck the promoter with his fists, and with instruments not fitting to be used for purposes of correction; that the defendant on one occasion made the promoter, who is not a regular seaman, go aloft for the vane, which the service of the ship does not seem then to have required to be done, and which moreover could not be done by the promoter without danger to his life; and upon his failing to accomplish this object after a second effort the defendant made him strip and go upon his knees and beg his pardon. This incident occurred at night when the ship had a lift over, and when if the promoter had lost his hold he probably would have fallen into the sea and been drowned. The observation made by the defendant to the promoter when he was going up the

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shrouds must not be passed over, as it serves to shew the temper of mind of the defendant at the time. He asked him whether he had made his will and to whom he had given his watch and money. It is further in proof that, on another occasion during the voyage, the defendant took the promoter out of the galley and made him take off all his clothes, with the exception of his trousers, and according to one witness tied him to the windlass, and according to this and several other witnesses, took him upon the poop and made him fast, having his body naked, to the spanker boom on a very cold morning,—so cold that there was snow and ice on the deck,—the wind blowing from the north, and kept him there about fifteen minutes: that the defendant ordered a seaman to draw him a bucket of water, which he emptied over the promoter's head and person, and kept him shivering with cold some ten minutes after. There is no evidence of the promoter's having done any acts calling for correction on the part of the master; he had at the time ceased to act as steward, but if he had committed acts requiring correction that correction must have been reasonable and moderate without any admixture of cruelty. Here the acts complained of are acts which appear to be dictated by a malignant spirit, the defendant availing himself of his power as master of the ship to gratify a personal enmity towards the promoter who was entitled to his protection. Independently of a general course of ill-treatment which the promoter appears to have been subjected to, the ordering him to bring down the vane, and the exposing him, with his body naked, on a cold morning, and throwing water over him as above adverted to, are acts of extreme cruelty, for which no circumstance of palliation can be offered. In assigning the damages, consideration must, however, be had to the means of the defendant, as well as to the nature of the injury done by him; and bearing in mind

the costs to which the defendant stands liable on these proceedings, I decree the sum of 10*l.* sterling (a).

SARAH.

(a) "It is of importance that it should be known to those *who have the command of ships, that, under the colour of discipline, they are not to inflict unnecessary, wanton, and unlawful punishment upon those under their control, when distant from the shores of their own country, friendless and unprotected, and that rash and improper chastisement ought not,*

must not be resorted to." Per the Recorder of London, in passing sentence of transportation for life upon Richard Edwards and John Woodcock, the master and mate of a merchant vessel, tried before the Central Criminal Court on the 7th April, 1837.—*Nautical Magazine* for May 1837, No. 5, Vol. i.

Thursday 10th November, 1836.

VENUS—BUTTERS.

VENUS.

It is a good defence in a suit for wages by a seaman, that he could neither steer, furl, nor reef.

JUDGMENT.—*Hon. Henry Black.*

In this case the promoter shipped at Kingstown in Ireland, as a seaman, at the full wages of the other seamen engaged on board the vessel, but did not sign the ship's articles, and having come with the ship to Quebec, now claims the balance of his wages on the voyage out at the rate of 3*l.* a month, he having received one month's wages in advance upon being shipped. The defence set up to this claim of wages is that he is no seaman. It is proved by the officers of the ship that he could neither steer, furl, nor reef, and that his services were not worth more than 1*l.* a month. The promoter in receiving one month's advance appears to have received more than, under any circumstances, he would have been entitled to (a). I am not called upon in this case to determine whether a man being no seaman, shipping as a seaman, can recover anything in the shape of wages whatever. Such conduct has very much the appearance of a gross fraud on the master and ship, and may endanger the ship and the lives of all on board. If the individual here had been left in care of the ship's rudder, before his ignorance had been ascertained, without the supervision and presence of one of the officers of the ship as afterwards was found necessary,—the loss of the ship might have been the consequence. When the

(a) *Basten v. Butter*, 7 East, 479.

question of the right of a person so situated to a *quantum meruit* shall arise it will deserve consideration, whether the fraud of the party does not exclude the claim for a *quantum meruit* founded on equitable considerations, and whether there are not also considerations of public policy which are repugnant to any allowance whatsoever being made to a mere landsman shipping himself as an able-bodied seaman.

Maguire, for promoter.

Gairdner, contra.

The George Gordon.—“Nautical Magazine for February, 1837, No. 2, Vol. i., p. 121.

Saturday, 12th November, 1836.

PAPINEAU—MAXWELL.

PAPINEAU.

The mate of a vessel is chargeable for the value of articles lost by his inattention and carelessness; and the amount may be deducted from his wages.

JUDGMENT.—*Hon. Henry Black.*

This was an action brought by the mate of the brig Papineau, for wages claimed upon the termination of a voyage from Quebec to the West Indies and back again. There is no difference between the parties as to the amount of wages earned, these are admitted to be 18*l.* 13*s.* 9*d.* currency. The defence set up by the master is general misconduct, on the part of the mate, and a specific act of negligence in shipping rum on board of this vessel in the West Indies, whereby the head of one puncheon, of the value of 12*l.* currency, was stove in, and its contents spilled and lost. This being the only act of misconduct set up by the defendant, the attention of the Court is confined to it. It appears that the mate about the 2nd or 3rd of September last at the port of Kingston, in the Island of St. Vincent, received on board the vessel, about fourteen puncheons of rum from a drogher. To remove these from one part of the hold of the vessel to another there were used skids, that is, boards choked or fixed and steadied with wedges to roll the puncheons upon. One of these skids not being choked slipped, and in consequence the head of one puncheon was stove in and its contents lost. The operation was performed by candle light, with two men not belonging to the crew, under the superintendence of the mate. It is the general duty of the mate to take in the cargo and deliver it, and in the discharge of that duty, in this instance, he

PAPINEAU.

was bound to see that the skids were properly fixed, and is responsible for any damage arising from their being, as they appear to have been, insufficiently steadied, and not choked, as is usual. The loss must be made up by some person, either the owners of the ship, the master and crew, or the mate. The two former are entirely exempt from blame. It does not appear that the master or the crew participated actively or passively in this act of negligence, and hard as it may fall upon the mate, he being the person in fault, must indemnify the sufferers (a). The rule of law as to the liability of the officers and crew of a ship to shippers cannot be relaxed without infinite mischief. I decree, therefore, that there be deducted from his wages the 12% value of the puncheon lost, and I decree the balance of his wages being £6 13s. 9d. (b)

Cairns and Dickenson, for the mate.

Huot, contra.

(a) *The New Phoenix*, 2 Haggard, 420; *the Belvidere*, 1 Peters, Ad. Rep. p. 258.

(b) A chief mate suing for wages in the Court of Admiralty is bound to shew that he has discharged the duties of that situation with fidelity to his employers. Amongst the most

important of these duties are a due vigilance, care and attention to preserve the cargo from robbery; but he is not responsible for any embezzlement that may occur, not arising from any neglect of duty.—*The Duchess of Kent*, Newby, 1 W. Rob. 285.

Friday, 18th November, 1886.

SOPHIA—EASTON.

SOPHIA.

Master admitted as a witness in a case of pilotage. Damage occasioned to the ship by the misconduct of the pilot, may be set off against his claim for pilotage.

JUDGMENT.—*Hon. Henry Black.*

This is a suit for services rendered by the promoter, who is a branch pilot, to the brig Sophia, in piloting her from Bic to Quebec, in October, 1884. The amount charged for the pilotage stands admitted. The defence set up by the owners, who have intervened in the suit against the ship, is that the promoter conducted himself so negligently and unskilfully in bringing the vessel to, and mooring her in the harbour of Quebec, that she went foul of another ship, whereby the bowsprit, jib-boom, fore-top-gallant-mast, bulwarks, and stanchions of the Sophia were carried away, and damage suffered to an amount exceeding the sum claimed for pilotage. The principal witness offered on the part of the defence is the master of the Sophia, who was master at the time the collision took place. None of the crew who were on board at the time are now here, and this is the fourth voyage of the ship to Quebec since the accident happened. The harbour-master proves the condition of the ship, after the occurrence of the accident; and the superintendent of pilots proves that the ship was in a damaged condition at that time, and that the master preferred a written complaint to him against the promoter. The questions which arise in this case are, first, whether the master is a competent witness; and the next, whether the defendants can set up the collision and damage as a

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defence to the present action. The question of the competency of the master as a witness in suits with seamen came under the consideration of the High Court of Admiralty in the case of the *Exeter* (a), and the case of the *Lady Ann* (b). In the former of these cases, the question turned upon the validity of a discharge of the mate by the master, without calling the attention of the passengers and crew to the circumstances attending it; and the master was virtually called upon to justify himself, and relieve himself from the responsibility incident to the discharge, if it were an improper one. The last of these cases, which occurred as late as 1810, was a proceeding against the owners; the defence set up was desertion, not implicating the master individually towards the owners, and Lord *Stowell* held the master to be a competent witness; if this be true in the case of a seaman's suit against the ship, it cannot be less so in the case of a pilot. The master is not answerable, even to the owners or to any other persons, for the acts of the pilot in whom the navigation of the ship is (c). The evidence of the master must, however, be carefully weighed. If he be the only witness upon the present occasion, the promoter has to impute it to himself, in not having brought his action earlier; and the delay in bringing the action, which is altogether unexplained on his part, constitutes a presumption against the promoter, that the demand has no foundation in justice or equity. The complaint of misconduct having been made in regular course to the superintendent of pilots, and no measures taken by the promoter to enforce his claim at that time, his inaction has very much the appearance of an acquiescence in the justice of the defence now set up on the part of the owners. Taking the evidence of the master to be legal

(a) 2 Rob. 267.

(b) Edw. 235.

(c) Molloy, B. 2, c. 9, 1 & 2;
3 Kent's Com. 135.

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evidence in the cause (*d*), the misconduct complained of appears to me to be sufficiently established.

Then the only remaining inquiry is, whether the damage suffered thereby may be made a set-off against the promoter's demand. Courts of Admiralty may, and do entertain pleas of set-off, upon general principles of equity, where the claim attaches to the particular maritime demand submitted to their cognisance by the libel (*e*). The rule and practice of the Admiralty, in this respect, seems to be the same as that which has obtained in the continental courts, under the name of re-convention (*f*). The damages in the present case exceeding the amount claimed, I decree for the defendants (*g*).

(*d*) Glassford's Principles of Evid., 443; Holt on Shipping, Vol. i., p. 464 ed. of 1820; The Malta, 2 Hagg. 165.

(*e*) The New Phoenix, 2 Hagg. 420; Abbott on Shipping, Amer. ed. of 1829, p. 473; Latham v. West, 5 Martin's Louis Rep. 573.

(*f*) Toullier, Liv. 3, Tit 3, Ch. 5. s. 4, No. 359, Tom. 7, p. 435.

Les dommages et intérêts sont une suite nécessaire, non-seulement de tout crime, mais encore de toute impéritie, négligence, faute même très-légères, quelle que soit leur nature, qui, à raison de ce, mérite une sévère punition. Argument tiré des Lois, 3. s. 5,

l. 5, ff. Nautæ. Institution au Droit Maritime, par Boucher, s. 574, p. 151.

If a pilot undertake the conduct of a vessel to bring him to St. Malo, or any other port, and fail of his duty therein, so as the vessel miscarry by reason of his ignorance in what he undertook, and the merchants sustain damage thereby, he shall be obliged to make full satisfaction for the same, if he hath wherewithal; and if not, lose his head. Leg. Oleron, Ch. 23.

(*g*) Decision to same effect in the case of the Clyde, 6 Aug. 1840, and the Canada, 12 November, 1841.

Thursday, 1st December, 1836.

ADVENTURE—PEVERLEY.

Probatory terms are in general peremptory, but may be restored for sufficient cause. ADVENTURE.

Per Curiam.

Upon the libel being admitted, a probatory term was assigned on the 9th instant for the promoter to produce witnesses, and prove the allegations in his libel on or before the next court day, which was on the 11th. The defendant having filed his responsive plea on the 23rd, the Court in like manner assigned as a probatory term to the defendant the next court day, which was the 25th. It now appears that the promoter examined, within the probatory term assigned to him, the following witnesses, Regis Jean, Pierre Dupuis dit St. Michel, and Joseph Savard; and after the expiration of his probatory term, the following witnesses, Thomas Colbourn, William Peverley, and Pierre Goudreau. As well the proctors of the parties as the registrar of the Court appear to have been in error, in supposing that it was competent to them to examine witnesses after the expiration of the probatory term to them respectively assigned. To have authorized these examinations, it was absolutely necessary that continuances of the probatory term should have been had. I am not authorized to grant publication of the depositions taken subsequently to the expiration of the probatory term: but, as the parties appear to be in error, I will entertain a motion from either or both to be restored to a term probatory, and will assign a new day for the parties to prove their pleas, if a motion should be made to that effect. In the absence of a formal consent of the parties by their proctors, I see no other course by which

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the justice of this case be attained. The grounds upon which a party may be restored to his probatory term will be found in Oughton (*a*). It will there be seen that this restitution is anything but a matter of course; and I wish it to be distinctly understood that if the probatory term be restored, it is merely from the consideration that both parties seem to have been in *pari errore*; and from the laxity of the practice which has hitherto obtained in this Court, their error may be considered as a venial one. The same reason will not apply to any future case, and I shall not feel myself at liberty to relax the strict rule under which probatory terms are considered peremptory.

(*a*) Oughton's Ordo Judiciorum, Tit. 75, Ob. Sub. lit. (*i*).

12. Licet Terminus Probatorius, assignatus per Judicem Litigantibus, dicatur esse peremptorius; ita ut Pars Aatrix, sive Rea, tenetur producere Testes suos infra eundem: Tamen, ex causis quibusdam, Partes litigantes restituendæ sunt in novum Terminum Probatorium;

13. Exempli gratiâ; Si locus judicii non sit tutus; utpote, quia Pestis ibidem sæviebat, toto Termino Probatorio, vel pro majori parte ejusdem, Pars non tenetur hujusmodi locum adire, et (si Pars voluerit) Testes non sunt compellendi, ad comparandum in tali non tuto loco;

14. Si, pendente Termino Probatorio, Causa fuerit (Consensu Partium) compromissa, vel in Arbitros relata, et ita steterit toto Termino Probatorio, vel pro majore parte ejusdem;

15. Si Pars principalis, quæ Testes produceret, fuerit continuò incarcerata, vel ita ægrota, ut (sine periculo vitæ) non potuerit

adire locum Judicii, vel Causam prosecui;

16. Si fuerit Regii Negotiis impedita, pendente hujusmodi Termino Probatorio; danda est Restitutio.

17. Sunt etiam nonnulla alia impedimenta, propter quæ concedenda est Restitutio; quæ relinquuntur boni Judicis Arbitrio.

18. Si, Impedimentis hujusmodi allegatis, et Restitutione petitiâ, Pars adversa hujusmodi Restitutioni obsteterit, et ea (vera esse inficiando) negaverit, cogeretque Adversarium eadem Impedimenta probare; si probaverit; Adversa Pars (hanc Probationem cogens) est condemnanda in expensis, eâ ratione factis, et concedenda est petita Restitutio.

19. Et, e contra; si Petens hanc Restitutionem defecerit, in Probatione causarum allegatarum, ad obtinendum Restitutionem; deneganda est Restitutio, et condemnanda est Pars, petens Restitutionem in Expensis retardati Processus.

Wednesday, 7th December, 1836.

ADVENTURER—PEVERLEY.

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Pilots may become entitled to extra pilotage in the nature of salvage for extraordinary services rendered by them. The jurisdiction of this Court is not ousted, in relation to claims of this nature, by the Provincial Statute, 45 Geo. 3, c. 12, s. 12.

JUDGMENT.—*Hon. Henry Black.*

This is a claim of salvage set up by the promoter, who is a branch pilot for the river St. Lawrence, for services by him rendered to the brig Adventurer, which was stranded at Mille Vaches in the river St. Lawrence, on her voyage to Quebec, about the sixth of October last. From the depositions in the cause it appears that, soon after the stranding of the brig, the master took the promoter on board as a pilot, and promised him a remuneration for any extra time that he might be detained there. On going on board upon the 9th of that month, he found the rudder unshipped, and that there were between two and three feet of water in the hold, but the weather was not boisterous, nor was the brig in any immediate danger. The promoter taking charge of the brig, the rudder was shipped, a kedge taken out astern, and the brig lightened by throwing out a small quantity of coals and other portions of her loading. The master having on the previous day hired the schooner Louisa, she came alongside, and continued with the brig till her arrival opposite Kamouraska, where her loading from the brig was completed, and she proceeded to Quebec with the master and the promoter on board, piloted by the promoter. Upon the lightening of the brig at Mille Vaches, as already stated,

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she floated, and proceeded under charge of the promoter, as pilot, to Cacona, where the master of the schooner went on shore for assistance, and returned with fifteen men, for the purpose of pumping the brig, the water gaining on her. On Wednesday, the 12th of October, these hands came on board, and in the afternoon the wind began to freshen, and it came on to blow, with snow, so that at intervals it was impossible to see the land, in consequence of which the vessel was laid to; but at the instance of the master she was put before the wind by the promoter, and brought to an anchor at the foot of the traverse, the weather still continuing stormy, and so thick that it was impossible to see the land. The brig having remained about ten hours at anchor, and the wind changing to the westward, the anchors were got up, and the brig was by the promoter, against the wishes of the master, run down to Kamouraska, where she was put ashore, and lay in safety upon the muddy bank of an island called Cow Island, at which place the schooner, with the promoter and the master left her. Some blame has been imputed to the promoter for taking the brig back to Kamouraska, but the Court sees no reason to doubt the soundness of the discretion exercised by him on that occasion. The promoter piloted the schooner from Kamouraska to Quebec, and afterwards returned with the master in a steamboat, by which the brig was towed into Quebec in safety, under the care of the promoter, until she came alongside of the wharf there on the 21st of the month.

There being no question as to the facts of the case, the sole inquiry for the Court is whether, under the foregoing circumstances, the promoter is entitled to any extraordinary remuneration for his services, and what that remuneration ought to be. It is a settled rule, that pilots assisting vessels in distress, beyond what their mere duty requires, are entitled to an additional pilotage as a compensation

for their extra services. "It is held expedient for the general safety of navigation, that persons ready on the water, and fearless of danger, should, by liberal reward, be encouraged to go out for the assistance of vessels in distress" (a). Pilots are not in strictness entitled to salvage, their duties are necessarily hazardous, but under extraordinary circumstances of peril or exertion, they become entitled to an extra pilotage, as for a service in the nature of a salvage service (b). To the authorities derived from English and American sources may be added the following reasons for the rule, as assigned by Valin, in his commentary upon the thirteenth article of the third title and fourth book of the Marine Ordinance of Louis XIV. "En effet, quoique la taxe soit faite sans distinction des saisons ni des circonstances qui peuvent allonger ou accourcir le temps du pilotage, elle n'est jamais censée porter sur des cas extraordinaires, tels que ceux d'une tourmente et d'un peril manifeste. Il est donc naturel alors d'accorder au lamineur une taxe particulière et extraordinaire, eu égard a son travail aussi extraordinaire, et au danger qu'il a couru. Mais ce n'est pas à lui, à fixer la rétribution qui lui est due; et si le maître n'en convient pas à l'amiable avec lui, après le péril passé, c'est au juge à la régler, de l'avis de gens experts, tels que sont des armateurs, et des capitaines de navires" (c). The exertions and services of the promoter in this case are clearly beyond the immediate scope of his duty as pilot, and entitle him to remuneration in the form of extra pilotage (d).

(a) Per Lord Stowell, apud. 1 Rob. 313, case of the Sarah.

(b) The Joseph Harvey, 1 Rob. 306; The General Palmer, 2 Hagg. 176; The Enterprise, ibid. 178 in note; The City of Edinburgh, 2 Hagg. 333; The Paraggio, Bee's Cases in the District

Court of South Carolina, p. 212; 1 Bell's Com. 594; Abbott on Shipping, Story's note 161; 3 Kent's Com. 198.

(c) Commentaire sur l'Ord. de la Marine, Tom. 2. p. 503.

(d) Boucher, Inst. au Droit Maritime, 2682; Vincens, Expo-

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In settling the quantum of remuneration in these cases the Court must be guided by the particular circumstances of each particular case. The reward must be so apportioned that pilots may be encouraged to strenuous exertion in cases of danger, it being, however, borne in mind that the natural and ordinary duties of their vocation necessarily exposes them to dangers, for the encountering of which a liberal allowance is secured to them in the ordinary rates of pilotage, and in an exclusive possession of this source of emolument. No persons are more capable of fixing the quantum of remuneration than the Trinity Board, whose duty it is to exercise a general superintendence over this body of men. The Legislature has wisely vested the power in the Trinity Board, and enabled them to execute it in a summary form, and at little expense. "For the encouragement of pilots, who shall distinguish themselves by their activity and readiness to aid and assist any ship or vessel in distress, and in want of a pilot in the river St. Lawrence," it is enacted (e) "that the master or owner of any ship or vessel in distress, and in want of a pilot in the river St. Lawrence, shall pay unto any pilot who shall have exerted himself for the relief or preservation of such ship or vessel, such sum, for extra services, as the said master or owner and pilot may agree upon; and in case no such agreement shall be made by the parties aforesaid, the Master, Deputy Master and Wardens of the Trinity House of Quebec, or any two or more of them (whereof the said Master or Deputy Master shall be one), are hereby empowered, upon the petition of such master, owner or pilot, or either of them, to ascertain and declare by an award and order, under the hands and seals of them, or any two of them, as aforesaid, the sum which

sition Raisonnée de la Législation Commerciale, Tome 3me, p. 107.

(e) 45 Geo. 3, c. 12, s. 12.

shall be paid by such master or owner, to such pilot for such extra services as aforesaid, and such sum so as aforesaid ascertained and declared, shall be levied in manner hereinafter directed" (f). The rule as to the allowance of extra pilotage in cases like the present one, which is recognised in the decisions of the English and American Courts, is positively sanctioned by an enactment in the Marine Ordinance of Louis XIV. (g). This article, in enacting that there shall be in cases of extraordinary danger or difficulty an allowance of extra pilotage to the pilot, vests in a summary tribunal the power of regulating the quantum of the extra allowance to be made to the pilot, a provision analogous to that which is contained in the clause of our provincial statute, which has been already adverted to. The rights of the parties, the interest of trade, and the substantial justice of cases of this description are all consulted and promoted by this provision. The jurisdiction of this Court, however, is not excluded by the statute; and although I may regret that this more summary proceeding has not, upon the present occasion, been adopted, yet I am bound to give judgment upon the claim brought before me. The services of the promoter are clearly meritorious ones, exceeding his ordinary duties as pilot, and entitle him to an extra remuneration. Besides this, there was an express agreement between him and the master, on

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(f) The Act containing the above provision was repealed by an Act passed on the 30th of May, 1849, to consolidate the laws relative to the powers and duties of the Trinity House of Quebec (12 Vict. c. 114), the 42nd section of which contains the following provision:—

"And be it enacted, that any pilot saving or endeavouring to

save a vessel in distress shall be entitled to a remuneration to be fixed by the Trinity House of Quebec, if such pilot shall not have agreed with the master or owner of the vessel as to the compensation for such service, provided he be not the pilot on board and in charge of such vessel."

(g) Liv. 4, tit. 3, art. 13.

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entering into the service of the vessel that he should receive an extra allowance, which under the statute was a good and valid agreement. I therefore award to the promoter a sum equal to double the ordinary rate of pilotage. In this sum is included any remuneration to which the promoter might lay claim for piloting the schooner Louisa to Quebec, considering him while on board of the Louisa, as being there in the service of the Adventurer (*h*).

(*h*) A pilot, while acting within the strict line of his duty, however he may entitle himself to extraordinary pilotage compensation for extraordinary services, as contra-distinguished from ordinary pilotage for ordinary services, cannot be entitled to claim salvage. In this respect he is not distinguished from any other officer, public or private, acting within the appropriate sphere of his duty. But a pilot, as such, is not disabled, in virtue of his office, from becoming a salvor.

On the contrary, whenever he performs salvage services beyond the line of his appropriate duties, or under circumstances to which those duties do not justly attach, he stands in the same relation to the property as any other salvor, that is, with a title to compensation to the extent of the merit of his services, viewed in the light of a liberal public policy.

Hobart v. Drogan, 12 Peters's Reports, Supreme Court of the United States, p. 117.

Tuesday, 21st February, 1837.

ROYAL WILLIAM—PENNEL.

In case of wreck in the river St. Lawrence (Rimouski), the Court has jurisdiction of salvage.

Under the circumstances of this case the service is a salvage service, and not a mere *locatio operis*, though an agreement upon land was had between the parties in relation to such service.

In settling the question of salvage, the value of the property, and the nature of the salvage service, are both to be considered.

Salvors have a right to retain the goods saved, until the amount of the salvage be adjusted and tendered to them.

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JUDGMENT.—*Hon. Henry Black.*

This is a claim as for salvage by the promoters on the schooner Royal William, of the burthen of forty-five tons, and her cargo, she having gone ashore on the 25th of October last, between Barnabé Island and Rimouski, in the river St. Lawrence. The material facts are that this schooner, laden with fish, on a voyage from St. George's Bay, in the Island of Newfoundland, to Quebec, was overtaken by a storm, as she was lying off the east end of Barnabé Island at anchor, of such violence as to part her cables, and oblige her master to run her ashore at Rimouski, between Barnabé Island and the main land. The captain and crew left the ship, and went on shore, and in consequence of a communication which took place between him and the promoters, they went on board the vessel, hired carters and labourers, and removed and stored the whole of the cargo at Rimouski. In this work they appear to have been engaged three days, and to have slept on board the vessel. The tide ebbed and flowed in her, and she was lying over in about ten inches of water at low tide. At the end of the three days, the

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master and crew went on board, and unrigged her, and the rigging was carted and stored with the cargo. The written power from the master to the promoters, which was executed upon his first coming on shore, authorises them to take possession of the ship; and some of the witnesses swear that the master had stated verbally, that they were so authorised. The master does not seem to have understood the French language, in which this authority is written, and several witnesses swear that no authority was given by him to the promoters to take possession of the vessel. This fact, however it may have been, does not seem material; the only questions before the Court, are questions upon which the fact of possession has no bearing. These questions are:

1. Has the Court jurisdiction in cases of salvage, occurring at the place where this vessel was wrecked.

2. Are the promoters entitled to salvage, and if so, what ought to be the quantum thereof.

Upon the first question, it appears that whatever doubts might have existed as to the jurisdiction of this Court in cases of salvage occurring in the river St. Lawrence, previous to the passing of the 2 Wm. 4, c. 51, those doubts must be considered entirely set at rest by that statute, the sixth section of which is as follows:—
“Whereas in certain cases doubts may arise as to the jurisdiction of the Vice-Admiralty Courts in His Majesty’s possessions abroad, with respect to suits for seamen’s wages, pilotage, bottomry, damage to a ship by collision, contempt in breach of the regulations and instructions relating to His Majesty’s service at sea, salvage and droits of Admiralty: be it therefore enacted, that in all cases where a ship or vessel, or the master thereof, shall come within the local limits of any Vice-Admiralty Court, it shall be lawful for any person to commence proceedings in any of the suits hereinbefore mentioned in such Vice-Admiralty Court, notwithstanding

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the cause of action may have arisen out of the local limits of such Court, and to carry on the same in the same manner as if the cause of action had arisen within the said limits." It has been argued that this is a contract upon land, and the case has been attempted to be assimilated to the ordinary contract of hiring, *locatio operis*, to land goods from a ship; but this view of the case is incomplete and inaccurate. The right of the promoters depends not merely upon a *locatio operis*; it is for their services in saving the cargo on board of a ship wrecked in the river St. Lawrence, and abandoned, which is clearly a case of salvage (a). The agreement between the promoters and the master is incidental to salvage in a case of wreck. In determining whether the Court has jurisdiction or not, we must look at the nature of the principal subject of controversy; and if it be within the jurisdiction of the Court, it will draw along with it all accessory matters.

We are then to look at the nature and value of the services performed by these parties. They go on board the ship, hire carters and labourers, superintend the removal of the cargo, and remain,—with some personal inconvenience, though I think without any personal risk or danger,—on board during the night. The master and crew had left the vessel upon her stranding, and returned to her at the end of three days for the purpose of unrigging her, after her cargo had been discharged, and then finally abandoned her.

I do not see any salvage service rendered to the ship, which can entitle the promoters to salvage compensation in respect to it. They appear to have gone on board the ship for the purpose of removing the cargo, and there is no evidence of any service having been rendered

(a) Happy Return, 2 Hagg. 206. See also the case mentioned in a note, of a claim of salvage

for the unlading and housing of goods, from a wreck brought into Pagham Bay.

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to her after that removal, or indeed required. As to the cargo, the promoters are clearly entitled to a salvage compensation, and the sole question is, as to its quantum. The claim of the promoters embraces two heads; first, for disbursements laid out by them in removing, and putting into a place of safety the cargo; and next, a claim of compensation for their personal services, in directing and superintending the saving of the cargo. There does not seem to be any doubt as to the sum to be allowed for the disbursements. Mr. McKinnon states that the costs of landing the cargo might be about 20%, and that he was in treaty with individuals on shore, to land it for that sum. The total sum charged by the promoters is 35*l.* 16*s.* 6*d.*, of which 15*l.* is for the hire of the store into which the cargo was placed, and 2*l.* 5*s.* for notarial charges, &c., leaving 18*l.* 11*s.* 6*d.*, for the disbursements incurred by the promoters in putting the cargo on shore, which may therefore be taken to be a moderate and reasonable charge. The services of the promoters relate to the saving of the cargo; their remaining on board of the ship during the night whilst the cargo was delivering, is evidence of their zeal and attention in the performance of this service. In settling the question of the salvage, the value of the property and the nature of the salvage service are both to be considered. The parties have consented to a valuation of the property saved at 100% for the ship, and 264*l.* 5*s.* for the cargo, from which last sum deducting 120%, the expense of transport from Rimouski to Quebec, there is left the net value of 144*l.* 5*s.* It appears that of 35*l.* 16*s.* 6*d.* charged by the promoters, 15*l.* was paid by the claimant before the owner of the store would allow the cargo to be removed, reducing their account of disbursements to 20*l.* 16*s.* 6*d.* I think that to this there ought to be added a further sum of 20%, that is 10*l.* each, to the promoters for their salvage services, and I accordingly decree in

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favour of the promoters for 40*l.* 16*s.* 6*d.* currency. The expenses of the commission, amounting to 9*l.* 19*s.* 0*d.* are also to be paid by the claimant.

I am sensible that the salvors must have been put to considerable inconvenience and expense in prosecuting this suit, in consequence of the distance of their residence from the seat of the jurisdiction of this Court. But it is not in my power, sitting here, to give them any relief on this score; indeed, the inconvenience to which they have been subjected is due to themselves. Their course was very plain, that of retaining the goods saved until the salvage was adjusted and tendered to them (*b*). They have thought proper to adopt another one, entailing upon themselves expense and inconvenience, which might have been obviated by exercising their legal right of retention (*c*).

(*b*) *Hartford v. Jones*, 1 Lord Raym. 393; the *Blenden-hall*, 1 Dodson, R. 414.

(*c*) A person who by his own labour preserves goods which the owner, or those entrusted with the care of them, have either abandoned in distress at sea, or are unable to protect and save, is entitled by the common law of England to retain the possession of the goods saved until a proper compensation is made to him for his trouble. This compensation, if the parties cannot agree upon it, may by the same law be ascertained by a jury, in an action brought by the salvor against the proprietor of the goods; or the

proprietor may tender to the salvor such sum of money as he thinks sufficient, and upon refusal to deliver the goods, bring an action against the salvor; and if the jury think the sum tendered sufficient, *he will recover his goods, or their value*, and the costs of his suit. *Petersdorff's Abridgement*, Vol. 11, p. 483.

As to the right of retention, under the French and Civil law, see *Troplong, Des Priviléges et Hypothèques*, Tome premier, No. 175, p. 256, No. 264, p. 386; *Pardessus, Cours de Droit Commercial*, Tome 3eme, No. 955, p. 557; *Voet ad Pand. de Compens.* No. 20.

Saturday, 24th June, 1837.

FRIENDS—DUNCAN.

FRIENDS.

The Admiralty jurisdiction, as to torts, depends upon locality, and is limited to torts committed on the high seas. Torts committed in the harbour of Quebec are not within the jurisdiction of the Admiralty.

JUDGMENT.—*Hon. Henry Black.*

This suit is brought by the promoter, a passenger on board the barque *Friends* on her voyage from Dublin hither, against the defendant, the master, for the recovery of damages; and the promoter sets forth in his libel divers injuries alleged to have been committed against him by the defendant, as well during the voyage as at this port of Quebec, where the vessel has latterly arrived. No objection is made to those articles in the libel which set forth injuries alleged to have been committed on the high seas; the only question for the consideration of the Court now is, as to the admission of the fourth article in the libel, setting forth those injuries which are alleged to have been committed in this port. The promoter, in this article, alleges that during the voyage, and before its completion, and while the ship was "in the river St. Lawrence, off the city of Quebec, in the port of Quebec," within the ebbing and flowing of the tide, and within the jurisdiction of this Court, a child of a relation of the promoter died, and that the defendant had maliciously accused the promoter of having murdered the said child, and published and proclaimed the same, and prevented the promoter from interring it, and caused the coroner for the district of Quebec to go on board the barque to hold an inquest on the said child. That on the evening of the same day the defendant placed the promoter in irons, and sent him on shore to gaol, with circumstances of peculiar cruelty.

It is objected that the acts here complained of being alleged to have been committed at a place which is *infra corpus comitatus*, the Court has no jurisdiction.

FRIENDS.

In all cases of jurisdiction the Court is called upon to perform a delicate and important duty. As on the one hand it is the duty of the Judge to maintain unimpaired the jurisdiction wherewith the law has invested him, so on the other he must be cautious not to assume authority on matters beyond the pale of his jurisdiction. He can have no inclinations or bias either way. The power which he is to exercise is held by him in trust, and must be maintained in its integrity, neither enlarged nor abridged, within the precise limits which the law has defined. Sir *Thomas Strange* has expressed with peculiar felicity the duty of a Judge in this particular, "It is said in many cases *boni judicis est ampliare jurisdictionem*. If for *jurisdictionem* be read (as was always read by Lord *Mansfield*) *justiciam*, it is a noble maxim. If an object and matter of jurisdiction exists, it is indeed the part of a Judge, so far as circumstances may admit, to administer an enlarged and amplified justice, embracing the interests of all parties and all the bearings of the case in any other sense of the maxim. It seems to me that the strength of every jurisdiction consists mainly in a temperate admeasurement of it by those in whom it is vested; and that so far from its being the duty *boni judicis ampliare*, it becomes none more than Judges to set to others in power a different example, instead of, by overstrained constructions, and upon fanciful imaginations, to be outstepping the bounds set by their commission. Neither are we to presume that justice will not be done, though this Court, sustaining the plea, should decline the office of rendering it." (a). From the peculiar

(a) Per Sir Thomas Strange, Chief Justice of the Supreme Court of Judicature at Madras, in the case of *Nagupah Chitty v.*

Rachummah and Kenehpah, 9th March, 1802. See his Notes of Cases, Vol. 1, p. 136.

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nature of the class of questions to which that now under consideration appertains, I shall feel it necessary to enter more fully into the grounds of the conclusion to which I have come than any difficulty in the question itself would call for. I am of opinion that this Court has not jurisdiction of matters of the nature of that set forth in the fourth article of the libel. This article sets forth a malicious accusation, assault, and false imprisonment, committed within the harbour of Quebec, that is a personal tort committed within the body of the county. It has been thought that certain general terms contained in the commission of the Judge, conferred upon the Court power to take cognizance of matters happening in ports, harbours, &c., in this province, in the same manner as if they had happened *super altum mare*. The words of the commission referred to for the purpose of establishing this doctrine are those granting power to the Judge to take cognizance of and proceed in "any matter, cause or thing, business or injury, whatsoever, done or to be done, as well in, upon, or by the sea or public streams, fresh waters, ports, rivers, creeks, and places overflowed whatsoever within the ebbing and flowing of the sea or high water-mark, as upon any of the shores or banks adjoining to them or either of them." The Judicial Commissions of the Admiralty are of very high antiquity, and were settled long before the statutory provisions and legal decisions, whereby the jurisdiction of the Admiralty, as it was originally exercised, was materially abridged. But "it is universally known," says Lord *Stowell*, "that a great part of the powers given by the terms of that commission are totally inoperative, and that the active jurisdiction of the Admiralty stands in need of the support of continued exercise and usage"^(b): and again,

(b) *The Apollo*, 1 Hagg. 312.

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in the case of the *Atlas*, he says, "This Court, except upon the subject of prize, exercises an original jurisdiction, upon the grounds of authorised usage and established authority. The history of the laws of this country shows full well that such authorised usage and established authority are the only supports to which this Court can trust, except in respect to the subject to which I have alluded (c)." In the commission to the Judge of the Vice-Admiralty Court, he is enjoined to try and determine according to the civil and maritime laws and customs of the High Court of Admiralty of England. Now, nothing can be more clear than that the High Court of Admiralty could not exercise jurisdiction in the case of a personal tort committed in a port or harbour lying *infra corpus comitatus*. Lord *Mansfield*, in *Lindo v. Rodney*, says, "The statutes of 13 and 15 Ric. 2, and 2 Hen. 4, do not exclude the common law in any case, and they confine the Admiralty by the locality of the thing done, which is the cause of action; it must be done upon the high sea. If done in ports, havens, or rivers, within the body of a county of the realm, the Admiralty is excluded (d)." There is no authority, or case, or dictum, to show that for a personal tort committed elsewhere than on the high seas, the Admiralty has jurisdiction (e). And all the elementary treatises are to the same effect. The Courts of Admiralty in the United States of America have held, that many of the old and established decisions of the common law courts in England, restrictive of the powers of the Admiralty, are encroachments upon the

(c) 2 Hagg. 55.

(d) Douglas, 615.

(e) Hawkeridge's case, 12 Rep. 129; Moore, R. 892; *Violet v. Blague*, Cro. Jac. 514; *Velthasen v. Ormaley*, 3 Term. Rep. 315;Com. Dig. Tit. Admiralty, F. 2; 2 Browne's Law of the Admiralty, 111; Viner's Ab. Tit. Court of Admiralty, E. 5; *Caton v. Burton*, Cowp. 330.

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legitimate powers of the Admiralty; and have, in consequence, maintained a more extensive jurisdiction than that which obtains in the British Courts of Admiralty (f). Notwithstanding this, however, those Courts do not appear to have ever set up a claim to jurisdiction in respect to personal torts committed in their harbours. Nor can I find any trace of such a claim set up in any of the old or present British colonies. I feel, therefore, with Sir *Christopher Robinson*, "that it is my duty not to adventure beyond the known limits of my authority, and I should only involve the parties in expense and disappointment were I to encourage any such experiment" (g).

It seems to have been supposed by the promoter's counsel that the relation which had subsisted between these parties, of passenger and master, might make a difference, but I do not see that it can (h). The action of the promoter must be either in tort or in contract. If his right of action be looked at as growing out of a contract, then the contract was a contract upon land; and the general rule is that if a contract be made on land to be executed at sea, or be made at sea to be executed on land, the common law has the preference, and excludes the Admiralty (i). The cause must arise wholly upon the sea, and not within the precincts of any county, to give the Admiralty jurisdiction. Suits for seamen's wages are an exception to this rule (k). The cases where the Admiralty has jurisdiction by reason of the subject matter, and where the proceeding is *in rem*, are a class by

(f) See the learned and elaborate judgment of Mr. Justice Story upon this point in the case of *De Lovio v. Boit*, 2 Gallison, 398.

(g) Public Opinion, 2 Hagg. 403.

(h) 2 Browne's Law of the Admiralty, 94.

(i) 3 Black. Com. 106; Comyn's Dig. Tit. Admy. F. 4 & 5.

(k) *Howe v. Nappier*, 4 Burr. 1950; Anonymous, 1 Ventris, 146.

themselves (1), and need not be adverted to in a case like the present, where jurisdiction is set up by reason of the locality of the act complained of. I reject the fourth article of the libel.

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Bradley, for the promoter.

Bowen, contra.

(1) *Menetone v. Gibbons*, 3 T. R. 267.

Friday, 30th June, 1887.

FRIENDS—DUNCAN.

FRIENDS.

The Admiralty has jurisdiction of personal torts and wrongs committed on a passenger on the high sea, by the master of the ship.

Unless in cases of necessity, master cannot compel a passenger to keep watch.

JUDGMENT.—*Hon. Henry Black.*

This is a case of very considerable importance in point of principle, to which the Court has felt it a duty to bestow its best attention. The claim is for damages arising from torts, alleged to have been committed on the high and open seas by the master to the promoter, a passenger on board his ship, on her voyage from Dublin to Quebec. These torts are alleged to consist: 1. In causing one of the two fire-places for the use of the passengers to be thrown overboard during the voyage, in consequence of which, and of the scarcity of fuel, the promoter could, with great difficulty, get but one meal of victuals dressed daily. 2. In reducing the allowance of the promoter and his family, consisting of nine persons, from three and a half to two gallons of water per day. 3. In obliging the promoter and his fellow-passengers to work the vessel and to keep watch at night, in consequence of there not being a sufficient number of seamen on board. 4. In assaulting, beating, and putting in irons the promoter, during the voyage, without any sufficient reason.

The proceeding here I understand not to be in law founded upon the contract, but upon the tort. The sailing with passengers without having the quantity of water prescribed by the statute, subjects the master to a penalty; and the infliction of this penalty does not take

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away from the passenger his right of action for the breach of the contract, which right of action is expressly reserved by the 17th section of the Passengers' Act (a). But this being a contract upon land, to be executed upon the sea, I think, as advised at present, that the remedy of the passenger upon the contract is exclusively with the common law courts. It does not thence follow that the passenger has no remedy in the Admiralty (b). The relation of master and passenger produces certain duties of protection by the master, analogous to the powers which the law vests in him over all the persons on board his ship; any wilful violation of which duties, to the personal injury of the passenger, entitles the latter to a remedy in this Court, as for "a cause of damage," a plea, or querele arising on the high seas. It is material to bear this distinction in mind in looking at and weighing the evidence in this cause. If this Court entertained the present suit as an action of damages founded directly upon the contract, it would be sufficient for the party complaining to prove the contract, and the breach of the contract by the master, to entitle the passenger to his damages, without reference to the *animus* of the master in the acts or defaults complained of. Looking at the liability of the master in this Court, as arising from a tort committed on the high seas, the *animus* of the master, and all the circumstances of the alleged breach of his duty of care and protection of the passengers, as master, come to be material in the determination of the question of his liability as for the tort: and this brings us to the examination of the facts of the case as disclosed in the evidence.

The testimony is somewhat contradictory; and as to the quantity of water on board the vessel, obscure and uncertain. The master could have no interest in sparing

(a) 5 & 6 W. 1, c. 53.

(b) The Ruckers, 4 Rob. 53, 73.

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the allowance of water to the passengers, nor any other motive than that of economizing this essential requisite for life, for the benefit of the passengers themselves. The mate swears positively to the propriety of the diminution of the allowance of water; and this Court will not lightly question the judgment of the master and officers of the vessel, in a matter wherein he is solely responsible, and of which he, under all the circumstances, was the best judge. It may be that the master has rendered himself liable to the penalty of the law, for not having the prescribed quantity of water on board his vessel when she sailed. It may also be, that in an action on the contract he would be liable in damages to the passenger. But the question in this case is, whether he has been guilty of a tort, and personal wrong to the passenger; and without having any opinion as to his liability, either for the penalty or for damages by reason of the breach of the contract, I am decidedly of opinion that the evidence does not fix liability upon the master as for a tort. The same considerations apply to the fact of the throwing overboard of one of the fire-places. Where acts are done apparently in good faith, for the safety of the lives of the crew and passengers,—which are in the keeping of the master,—and where there is no appearance of any malicious or improper motive in the master, the Court will feel it to be its duty to support him.

The next charge is the master's compelling the promoter to keep watch and work on board the ship. Although in cases of necessity it may be competent to the master to compel passengers and all others on board the ship to labour for her preservation, yet that necessity must be clearly made out. The evidence upon this point is so contradictory, that I am unable to say whether such necessity existed or not; or whether the keeping of watch was compulsory on the passengers, or proceeded

from their own free will, and from their conviction of the necessity of the measure for the safety of all on board the ship.

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As to the last remaining ground of complaint, that is, the having assaulted the promoter and put him in irons, and kept him there for an hour, the fact is not denied, and the justification set up by the defendant has not been proved. The defendant pleads "that the promoter was frequently quarrelsome and disorderly, and bore a bad character among his fellow-passengers. That on the third day of May, the promoter created a great disturbance in the said barque, and struck and otherwise beat and maltreated one John Craig, a quiet, respectable man, and a passenger on board the said barque; and resisted the orders of the mate, who commanded the promoter to keep quiet and cease fighting; and thereupon, on the complaint of the passengers, and at their request, the defendant caused him to be brought on deck and handcuffed, and placed to the lee of the round-house, and there kept and detained for the space of half-an-hour. That the punishment inflicted by the defendant on the promoter was necessarily inflicted, to prevent the promoter in his anger from doing further mischief and injury to his fellow-passengers; and also for the sake of example, and to preserve discipline on board the said ship, and was not attended with cruelty of any kind whatsoever." The deposition of John Craig, produced by the defendant, and whose testimony is clear and unbiassed, shows that the promoter had been provoked by an act of aggression of Craig himself, and that the retaliation, though not strictly justifiable, was natural, and not accompanied by any act of cruelty or gross violence. It was the duty of the master on this occasion, —before inflicting any punishment whatever,—to have heard what the promoter had to say in his justification, which he does not appear to have done. In all cases

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which will admit of the delay proper for inquiry, due inquiry should precede the act of punishment, and the party charged should have the benefit of that rule of universal justice, of being heard in his own defence. A punishment inflicted without the allowance of such benefit, is in itself a gross violation of justice (c), and in all cases where so rigorous a measure is resorted to, the master must be prepared to justify it. The authority of a master at sea is necessarily summary, and often absolute. For the time, he exercises the right of sovereign controul; and obedience to his will, and even to his caprices, becomes almost indispensable. If he chooses to perform his duties, or to exert his office in a harsh, intemperate, or oppressive manner, he can seldom be resisted by physical or moral force; and, therefore, in a limited sense, he may be said to hold the lives and personal welfare of all on board, in a great measure, under his arbitrary discretion. He is, nevertheless, responsible to the law; and if he is guilty of gross abuse and oppression, courts of justice ought not to be found slow in visiting him, in the shape of damages, with an appropriate punishment (d). Conceiving as I do, that the assault and putting into irons of the promoter by the defendant, and keeping him handcuffed and exposed to the weather for the space of from half-an-hour to an hour, was not warranted by law and oppressive, I decree on this head damages to the promoter, and assess the same at 10*l.* sterling (e).

Bradley, for the promoter.

Bowen, contra.

(c) *The Agincourt*, 1 Hagg. 274.

(d) Per Story, J., apud 3 Mason, p. 245.

(e) Magister navis habet potestatem carcerandi delinquentes in sua nave, etiam si delinquentes, essent clerici ad finem presen-

tandi eos coram iudice competente illius territorii, et districtus loci vicinioris, ubi delictum patratum fuit, aut in portu, ubi navis exoneratio sit destinata ad hoc ut ipsi puniantur.

Roccus de Navibus et Naulo, Not. 8, No. 17, 18.

Tuesday, 11th July, 1837.

LOCKWOODS—LAWTON.

A promise made by the master at an intermediate port on the voyage, to give an additional sum over and above the stipulated wages in the articles, is void for the want of consideration.

LOCKWOODS.

JUDGMENT.—*Hon. Henry Black.*

This is a suit brought by three seamen, George Lawson, Andrew Smith, and William Sweeney, to recover their wages accrued on a voyage from Liverpool to New York, and thence to Quebec. The voyage set forth in the ship's articles is from the port of Liverpool to New York, and from thence to Quebec, and any other port or ports in British America, at the option of the master, and back to the port of Liverpool, or any other port of discharge in the United Kingdom. At the foot of the articles is the following memorandum:—"The names of those men who are opposite the sum of 2*l.* 15*s.* are to have 5*s.* per month more on condition of their returning with the ship to Liverpool. June 1st, 1837, at Perth Amboy, United States of America. William Lawton, master." The ship being now about to proceed to a port in the United Kingdom, these three seamen claim to be discharged from the ship, and their wages down to this time. As to the two first, it is admitted that they signed these articles; the last denies having signed them, and there is no evidence of his having done so, or of his having engaged to go the voyage in question. All that we have is his name, and a mark purporting to be his, and a signature purporting to be the signature of a witness to his mark. But that witness is not produced, or any person who was present at the time when the articles purport to have been signed by

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him. The fact is directly put in issue by the pleadings, and there is no evidence direct or presumptive of the signature. He is therefore entitled to his discharge, and to his wages up to the time of his discharge, which I award. The two others claim their wages on the ground that the articles had been rescinded and rendered void by the promise contained in the foregoing memorandum. I am decidedly of opinion that there is nothing in this ground. There was no consideration for this promise, and it was utterly invalid even as to the additional sum of five shillings over and above the stipulated wages in the articles (a). Least of all can it be held that the promise of this additional sum should vitiate the pre-existing engagement of these individuals. Their action must, therefore, be dismissed (b).

(a) *Harris v. Watson*, Peake's Cases, 72. *The Isabella*, 2 Ch. Rob. R. 241; *Elsworth v. Woolmore*, 5 Esp. N. P. C. 84; *Stilk v. Myrick*, 2 Camp. 317.

(b) The plaintiff and other seamen had entered into articles of agreement to serve for a voyage from Liverpool to Melbourne and home. At Melbourne several of the crew deserted, and one of the crew was discharged by the captain. Whilst the desertion was going on, the captain entered into a fresh agreement with the plaintiffs and the other remaining

seamen to raise their wages for the remainder of the voyage.

Held, that the plaintiff never was, under the circumstances, released from the obligation of the original articles, and could not therefore maintain an action to recover the increased wages for the voyage home. See opinion of Lord Campbell, C. J., in which Sir William Wightman, Sir William Erle, and Sir Charles Crompton, all concurred. *Harris v. Carter and others*, Q. B. 24th May, 1854; 25 Law and Equity Reports (Boston), 220.

Tuesday, 18th July, 1837.

ATLANTIC—HARDENBROOK.

Abandoning seamen, disabled in the service of the ship, without providing for their support and cure, equivalent to wrongful discharge.

ATLANTIC.

JUDGMENT.—*Hon. Henry Black.*

This is an action for subtraction of wages. The promoter entered on board the barque Atlantic, as a cook, at Liverpool, on the 6th of March last, and signed articles on a voyage to Londonderry and Quebec, and thence back to a port of discharge in the United Kingdom. After the arrival of the vessel at Londonderry, he went on shore one evening with some of the passengers and got drunk, and returned at about half after six o'clock the following morning, and after the mate had directed another man to light the fires. Angry words passed between the mate and the promoter, and in going between decks the promoter fell or was pushed from the stanchion, and was so much hurt thereby that he was on the next day sent into the hospital, where he remained some twelve or fourteen days, and was then sent over in a steamer to Liverpool, where he was placed in an hospital in which sick seamen are received gratuitously. The exact period of time that he remained at this last hospital does not appear, but he shipped at Liverpool on the 13th of May, for this port in the Mary, and arrived here on the 19th of June last. On leaving the hospital at Londonderry, the master paid the promoter 1*l.* 5*s.* 3*d.* sterling. The wages which he was to receive in the Atlantic were 3*l.* sterling per month; and he appears to have received in the vessel wherein he sailed to this port 2*l.* 15*s.* per month.

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The only question of fact in the case is whether the promoter was disabled in the service of the Atlantic. If the injury which he sustained had been produced by drunkenness on his part, he must himself have borne the consequences of his own misconduct (a); but there is no proof of this, and I am bound to consider that the injury was sustained in the service of the ship. Such being the case it was the duty of the master to have provided medicine and attendance for the promoter at Londonderry, where the accident happened until his recovery, at the ship's expense (b). Instead of continuing to do so, the master sent the promoter against his will, by a steamer to Liverpool, without making provision for his being taken care of upon his arrival there; and being entirely destitute he was cast upon a public charity. I consider that this act amounted to a wrongful discharge of the promoter. The promoter might, if he had seen fit, waited the return of the Atlantic to Liverpool, and have recovered from the ship, the owners, or the master, besides the expenses which he could show that he had been put to for his cure, the wages stipulated by him in the ship's articles; deducting from these wages any wages which he might have earned between the period of his discharge from the Atlantic and her arrival at Liverpool. Such settlement of account could only be made

(a) Abbott on Shipping, Part 2, ch. 4, s. 13, p. 146; Laws of Oleron, art. 6; Wisbuy, art. 39; Cleirac on the Laws of Oleron, *ubi supra*; Boulay — Paty; Droit Commercial et Maritime, Tit. 5, s. 9, Tom. 2, p. 238; the Neptune, 1 Peters, Adm. R. 151; Pothier, Louage des Matelots, No. 190.

(b) Abbott on Shipping, Part 2, ch. 4, s. 13, p. 146; Laws of Oleron, art. 7; Laws of Wisbuy, art. 19; Laws of the Hanse

Towns, art. 45; Ordonnance de la Marine, Liv. 3, Tit. 4, art. 11; Valin sur l'Art. 11 de l'Ord. Tom. 1, p. 721; Loaré sur l'Art. 264 du Code; Pothier, Louage des Matelots, No. 189; Harden v. Gordon, 2 Mason, 541; Reed v. Canfield, 1 Sumner, 195; 5 & 6 Will. 4, c. 19, s. 18.

Similar provisions have been made in favour of merchant seamen by 17 & 18 Vict. c. 104, s. 228.

ATLANTIC.

with reference to the wages which the promoter might earn from this port to Liverpool, and it might be that these last wages would exceed the stipulated wages in the articles. In point of fact the present wages from Quebec to Liverpool are more than double these stipulated wages, but the principle remains the same, however this may be. The seaman is entitled to the deficiency, which could only be ascertained upon the conclusion of the voyage of the Atlantic at Liverpool, in an action brought there by the promoter. Bringing his action here he can only recover from the Atlantic,—subject to a deduction of the wages earned—the wages which have accrued down to the termination of the voyage hither, and that voyage appears to have terminated on the 19th day of June last. If the case had been to be considered as belonging simply to the class of cases of seamen being disabled in the service of the ship, and left behind provided for by the ship, it would have been the duty of the promoter, upon his recovery and upon his arriving at the port where the ship was, to have joined her and continued his service on board: or, what is equivalent to such service, to have tendered it and been refused, which would have amounted to a wrongful discharge. But, as I have already said, I consider the sending of the promoter to Liverpool, in the manner already stated, amounted to a wrongful discharge from that period, and the promoter was not bound therefore to tender his services to the ship here. There is no evidence of the promoter's having been individually put to any expense for his cure. From the gross amount of his wages will be to be deducted 1*l*. 5*s*. 3*d*. paid at Londonderry, and 3*l*. 6*s*. being the sum earned by him on board the Mary, leaving a balance of 5*l*. 15*s*. sterling, which last sum I accordingly decree to be paid to him.

Bradley, for the promoter.

Gairdner, contra.

Thursday, 20th July, 1837.

RECOVERY—SIMKIN.

RECOVERY.

Discharge demanded on allegation of insufficient and unwholesome provisions refused.

JUDGMENT.—*Hon. Henry Black.*

The promoters in this cause claim their discharge and wages on the ground that the vessel was not properly supplied with wholesome provisions on the voyage hither, whereby their health has been impaired, and they are unable to return. That, requiring medical treatment for eruptions brought on by the insufficiency and unwholesomeness of the provisions, the master, instead of providing proper medical treatment for them, had on their arrival, and on intimation being given to him by their proctor of his intention to institute the present proceedings, obtained a stay of proceedings under a promise of settlement, and in the meantime procured their conviction and commitment by a magistrate,—for being absent without leave,—to the common gaol of this district, where they have remained for about a week, without nourishment or clothes. These allegations are contested negatively by the master. It appears from the ship's articles that these men shipped and signed articles at the port of Youghall, in Ireland, on a voyage to Cork, thence to St. John's New Brunswick and Quebec, and back to a port of discharge. The evidence, as is too common upon these occasions, is very contradictory. The promoters have produced three seamen, who like themselves were engaged on board this ship, signed the same articles, and left the vessel at the same time, and under the same circumstances as the promoters. The master on his part

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has produced the cook and the mate of the vessel. If the witnesses of the promoters are to be believed the provisions furnished on the voyage out were insufficient in quantity, and bad in quality. On the other hand the witnesses of the master declare that the provisions were of good quality and furnished in sufficient quantity. The mate states that the meat used on board the ship had been salted some week or ten days before their sailing; and that the master and cabin passengers ate meat taken from the same barrels as the meat of the crew, and cooked in the same manner. It appears also, that if the meat of the seamen was not soaked, so also was not that of the master. Of these two contradictory statements the Court must adopt either the one or the other as the true one. Now, although the seamen produced by the promoters may be competent witnesses (*a*), it cannot be denied that their credibility is impaired by their being precisely in the same situation as the promoters; and it may be presumed that they are only waiting a favourable decision of this suit to bring a like one against the master or ship, and to use the promoters as witnesses for them in that suit. But however this may be, these witnesses are manifestly in a situation to produce a bias on their minds in favour of one of the parties and against the other. The mate and the cook are without interest, and the Court feels itself bound to believe their statements notwithstanding the adverse statements of the promoters' witnesses. The allegations then of the promoters as to the insufficiency and bad quality of the provisions is proved to be without foundation. Doctor Marsden, the medical gentleman who has been examined in the cause, states the presence on the persons of the promoters, and of some of the witnesses, of eruptions, which may have proceeded from bad or insufficient food, or from the want

(*a*) Phillips on Evidence 1, p. 44, 6th ed.

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of fresh provisions and vegetables, and the use of salted ones. It does appear that the meat had not been steeped in water previous to its being boiled, but it had been very recently salted, and the master and cabin passengers used it without steeping it, so that we cannot consider this as rendering the meat absolutely unwholesome. Then it is not said by the medical gentleman that these men cannot with safety go to sea, and from what we all know of the habits of this class of persons, I think that the improvement of their health is not likely to be effected by their being discharged at this port. If the state of the health of the promoters were to be considered as a substantive ground to claim their discharge, they should have produced the physician of the gaol, who appears after all to have been consulted only by one of them. Upon the evidence as it stands, I should not feel myself warranted in setting aside the contract. The conduct of the master in causing these men to be imprisoned under the circumstances which are proved in this case, may have been, and I think was harsh. But he had a legal right to the remedy which he used (*b*), and I cannot go the length of saying that by the exercise of this right the men came to be discharged from the engagements formerly entered into by them, and contained in the ship's articles (*c*). I am constrained, therefore, to dismiss the master from this cause, the seamen returning to their duty (*d*). But I cannot close the subject without urging strongly upon the master his duty to take every care of the health of these men on their passage home, both as concerns their provisions and their medical treatment. The seaman owes obedience to the master, which may be enforced by just and moderate

(*b*) Prov. St. 47 Geo. 3, c. 9, *actiones experitur*. D. 50, 47, 155, s. 4. s. 1.

(*c*) Non videtur vim facere, (*d*) See 5 & 6 Will. 4, c. 19, qui jure suo utitur, et ordinaria s. 42.

correction: but the master on his part owes to the seaman, besides protection, a reasonable and discreet care of his health; and I trust that this admonition will not be lost upon the master. If he be not fully satisfied that he will have the means of taking proper care of their health, and of preventing their present symptoms of disorder from being aggravated, humanity as well as the interests of the ship and of the owners require that the men should be paid off here.

Bradley, for the promoters.

Ahern, contra.

Monday, 31st July, 1837.

TWEED—ROBERTSON.

TWEED.

Where a seaman can safely proceed on his voyage, he is not entitled to his discharge by reason of a temporary illness.

JUDGMENT.—Hon. Henry Black.

The promoter, a carpenter on board the Tweed, claims his discharge from the ship and from the ship's articles, and wages down to the time of the discharge, on the ground that during the voyage, and while in the performance of his duty on board the ship, he had received a wound in his right leg, and that he had become so ill as to render him unable to do any further duty on board the vessel after the twenty-second of the present month; and that the master had refused to procure him any medical treatment or medicine on board, and refused to send him to the marine hospital. This is contested negatively, and it appears from the evidence that the injury complained of was not sustained in the service of the ship, but proceeded from an old malady; that the symptoms now complained of, being a disease of the bone of the thigh, accompanied by chronic inflammation of the muscles and a stiffening of the knee, so that it could not be bent, had come on spontaneously and without any assignable cause; that during the last five years he had been better and worse at times; and that when he went on board the Tweed, the malady was in a quiet state, and that he could bend his knee. The physician by whom he was examined (Dr. Fargues), upon being interrogated as to whether in the present condition of the promoter's health, it was fitting and proper that he should be taken to sea, says, that if the promoter should

not be required to work he might be taken home in the vessel, but that he does not appear fit for duty.

TWEED.

Upon these facts the sole question is, whether the Court would be justified in ordering the discharge of the promoter, and payment of his wages before the termination of the voyage. Mere sickness of the seaman does not determine the contract of hiring between him and the master. The whole of the provisions of the marine law on this subject are exceedingly humane, and all proceed upon the principle that the connexion between the seaman and the ship is not dissolved by illness during the voyage. The obligation of the master to take care of the seaman and provide for his wants during his illness remains unimpaired; his wages are still running on, and it is only his labour and services, and the right to claim them, which are suspended by his sickness. The master ought not to leave the seaman on shore when he sails, without this being absolutely necessary. The policy of the marine law generally, and of the statutes of the empire particularly (a), is against the leaving of seamen abroad. This policy is, however, controlled by the paramount consideration of humanity, and if the seaman cannot safely be taken back, he must be left on shore. Such cases may and do not unfrequently occur, but this does not appear to be one of them. Being of opinion that the master has not only a right, but is bound to take this seaman back with him, I dismiss the present action. At the same time it will be the duty of the master not to require from the promoter any services that his health does not permit of his performing. He will do well also to consider how far he will consult the interest of his owners and others concerned, in going to sea without an able-bodied carpenter on board.

Maguire, for the promoter.

Montizambert, contra.

(a) 5 & 6 Will. 4, c. 19, s. 41.

Friday, 25th August, 1837.

ISABELLA—MILLER.

ISABELLA.

Application for an attachment for a contempt against a magistrate, first seized of a seaman's suit, for having issued a warrant, and arrested seaman, whilst attending his proctor for the purpose of bringing the suit, rejected.

Per Curiam.

This is a motion for a rule on John Jones, Esq., one of the Justices of the Peace for the District of Quebec, Daniel Miller, master of the brig Isabella, and John Walley, a constable, to show cause why an attachment should not issue against them, on a suggestion that they have been guilty of a contempt of this Court by causing to be arrested the promoter in this cause while he was in attendance on this Court, and in going to, staying at, and returning therefrom, the promoter being a suitor and under the protection of the Court. In cases of desertion of seamen, the statute gives a summary jurisdiction to Justices of the Peace, and impowers any one of them to imprison the seaman upon conviction of having deserted (a); the Court of Admiralty exercising jurisdiction over suits for seamen's wages, and in cases of damage on the high seas. Now, whilst on the one hand this Court will maintain its authority by protecting its suitors *eundo, morando, et redeundo*, it must on the other hand be careful not to interfere with any other Judge or tribunal in the exercise of the authority conferred upon that Judge or tribunal by the law. In this case, not only had the warrant of the Justice issued, but it had been actually executed previous

(a) 47 Geo. 3, c. 9, s. 4.

to the issuing of the warrant which went out of this Court. The Justice was therefore seized of the cause before the issuing of the warrant, and the arrest was made before any suit actually brought here. The party was not attending the Court in a suit there pending, he was attending his proctor for the purpose of bringing the suit. There is then no ground for the present application, and the Court rejects it.

ISABELLA.

Friday, 25th August, 1837.

LYDIA—BRUNTON.

LYDIA.

Where a second mate is raised to the rank of chief mate by the master during the voyage, he may be reduced to his old rank by the master for incompetency, and thereupon the original contract will revive.

JUDGMENT.—*Hon. Henry Black.*

This is the case of a mariner shipping as second mate on a voyage from Sunderland to Painbœuf, thence to Quebec, and thence back to Sunderland. In the course of the voyage the first mate is discharged at the foreign port of Painbœuf, the promoter is raised to the rank of first mate, with additional wages, and an entry is made opposite his name in the ship's articles to the following effect:—"Made chief mate 4th June, at £4 10s. per month." The promoter proceeds to and arrives at this port, occupying the place of first mate down to the time of the arrival of the vessel here. He is incapable to discharge the duties of this office, he cannot keep the log, it is kept by the new second mate, and the promoter does not understand navigation. There is no controversy about these facts, they stand upon sufficient proof, and even the admission of the promoter. The master disrates him at this port, reduces him to his old rank of second mate, and is about to ship a new mate. The promoter conceives that he is not bound to serve in any other capacity on board the ship than that of first mate, treats his disrating as a discharge, and brings his action in this Court for his wages. The question for the consideration of the Court is whether the master is bound to continue him in his office of first mate, or to discharge him. I entertain no doubt that he is not bound to do

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so, and that he is entitled to require the services of the promoter, in the capacity in which he was originally engaged, down to the period of the conclusion of the contract. The Court is not called upon to say what would have been the respective rights of the parties, if the promoter had been equal to the discharge of the duties of first mate (a), and the Court intimates no opinion whatever upon this point, but he being unequal to the discharge of these duties has no right to insist upon the master's continuing to employ him in an office for which he is confessedly inadequate, jeopardising thereby the lives and property especially confided to the care and discretion of the master. If the new rating were considered as an original contract, it was subordinate to the first contract of hiring, and if it were to be considered other than a temporary employment *ex necessitate*, still the promoter impliedly covenanted for adequate skill, *spondet peritiam artis*. That implied covenant in the subordinate contract was a mutual and dependent covenant; it being not fulfilled, the original contract at all events revived, and the articles must be enforced. I accordingly decree that the action be dismissed. (b)

Bradley, for promoter.

Aylwin, contra.

(a) See opinion of Lord Stowell, in the case of the *Providence*, 1 Hagg. 391.

(b) These temporary appointments, made by the master of a vessel on an emergency, are held at his pleasure, they must necessarily be mere experiments of the success of which he is to judge. Assuredly such an appointment stands on a very different footing from that of mate, originally shipping as such, making his

contract for the office, and for the wages belonging to it. In such a case Judge Peters says (1 Peters Ad. Dec. 247), "The mate is a responsible officer in the ship, and generally chosen with the consent of the owners, he is under the orders of the master in his ordinary duty, but his contract is not subject to arbitrary control." Even, however, in that case, a mate may be displaced by the master for good causes to be

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judged of by the Court, which should "be evident, strong, and legally important." In this case there can be no question of the right of the master to return him to his first situation in the ship, under the circumstances of an attempt to elevate him, which his own incapacity and misconduct defeated. His pretension for

mate's wages from the time of his appointment to the end of the voyage, is altogether untenable, and must be dismissed. Per Judge Hopkinson, in the case of the *Nimrod*, Gilpin's Reports of Cases in the District Court of the United States for the Eastern District of Pennsylvania, p. 88.

Tuesday, 5th September, 1837.

BRUNSWICK—TULLY.

Death of the master, and substitution of the mate in his place, does not operate as a discharge of the seamen.

BRUNSWICK.

Per Curiam.

The sole question in this cause is whether the death of the master during the voyage, and the substitution of the mate in his place shall operate a discharge of the ship's articles. By the maritime law, upon the death of the master during the voyage, the mate succeeds him as *haves necessarius* (a). This rule of law enters into the contract, and the seamen on signing the articles virtually sign them with the mate as master upon the occurrence of this contingency. Independently of this implied agreement, the contract of the seamen is not merely with the master, but with the master, ship and owners, and a change of the master cannot therefore discharge it (b).

Bradley, for promoter.

Duval, contra.

- (a) Per Lord Stowell, apud 2 Rob. 237. See also Boucher, Institution au Droit Maritime, 432, 433. United States v. Hamilton, 1 Mason, 446. Valin, i. 532—Liv. 2, Tit. 7, art. 2. Poth., Louage des Matelots, No. 176. Pardessus, Droit Commercial, iii. p. 136, No. 698.
- (b) The Atalanta, Bee's Rep. 49; 2 Boulay Paty, 182.

Tuesday, 27th October, 1837.

LONDON—DODSON.

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The order in council of 20th November, 1835, passed to repeal the table of fees established under the authority of 2 Will. 4, c. 51.—1st. Had the effect of repealing the same. 2ndly. Did not give force or validity to the table of fees of 1809. 3rdly. Nor did it authorise the judges to grant fees as a *quantum meruit*.

By an Act passed in the second year of the reign of His late Majesty, for the regulation of the practice to be observed in the suits and proceedings of the Courts of Vice-Admiralty, in His Majesty's possessions abroad, and for the establishment of fees to be allowed and taken in the said Courts, by the respective judges, officers, and practitioners therein, it is enacted that it shall be lawful for His Majesty, with the advice of His Privy Council, from time to time to make and ordain such rules and regulations as shall be deemed expedient, touching the practice to be observed in suits and proceedings in the several Courts of Vice-Admiralty at present or hereafter to be established in any of His Majesty's possessions abroad; and likewise from time to time to make, ordain, and establish tables of fees to be taken or received by the judges, officers, and practitioners in the said Courts, for all acts to be done therein; and also, from time to time, as shall be found expedient, to alter any such rules, regulations, and fees, and to make any new regulations, or table or tables of fees. In pursuance of this Act, His Majesty, by an Order in Council, bearing date at the Court of St. James, the 27th of June, 1832, was pleased to approve certain rules and regulations, most humbly submitted to His Majesty in a memorial from the Right Honourable the Lords Commissioners of the Admiralty,

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dated the 19th day of the same month of June, touching the practice and proceedings in the said Courts of Vice-Admiralty, as laid down in a report of certain referees appointed by the Lords Commissioners of His Majesty's Treasury, and approved by the Judge, and other competent law authorities of the High Court of Admiralty of England; and His Majesty was further pleased to establish, by such Order in Council, certain tables of fees proposed and approved by the said authorities, as the only fees to be taken and received by the Judges, Registrars, Marshals, advocates and proctors of the Vice-Admiralty Courts of the respective Colonies, as laid down by the referees, and approved by the law authorities above mentioned: which said rules and regulations and tables of fees, went into force at this port of Quebec, on the 9th of May, 1833. Complaints having arisen as to the operation of the table of fees thus established in the Vice-Admiralty Court at Quebec, His Majesty in Council, passed an order bearing date at the Court at Brighton, the 20th of November, 1835, revoking and annulling so much of the said Order in Council of the 27th of June, 1832, as relates to the establishment of a table of fees in the Vice-Admiralty Court at Quebec, without then making any new table or tables of fees. Under these circumstances the following questions were submitted for decision in the present case: 1. Whether the Order in Council of the 20th of November, 1835, had the effect of repealing the table of fees established for the Court, by the Order in Council of the 27th of June, 1832. 2. Whether the Order in Council of the 20th of November, 1835, by repealing that part of the order of the 27th of June, 1832, which related to fees, revived the tariff which existed previously to the latter date. 3. Whether the Judge of this Court was invested with authority to establish a scale of fees as a *quantum meruit*.

The cause was argued much at length on the facts in

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the act of Court, by *J. P. Bradley* and *Dunbar Ross*, on the part of the petitioners, and by *George Okill Stuart*, on the part of the defendants.

JUDGMENT.—*Hon. Henry Black.*

The act on petition before the Court brings anew under its consideration the question of the effect of the repeal of the table of fees established for this Court by His late Majesty William the Fourth, on the 27th day of June, 1832, under the authority of the Act of the Imperial Parliament, 2 Wm. 4, c. 51, and the right of the officers of this Court to take and receive the fees which were established by the order so repealed, or any other fees. The act on petition contains three several articles or positions. The petitioners set forth, that in a certain suit for salvage services brought in this Court, the defendants tendered and brought into Court the sum of 41*l.* 1*s.*, currency, for these salvage services, and undertook to pay all costs incurred in this suit up to the date of the tender and incident thereto; and that the necessary fees and disbursements of the petitioners amounted to the sum of 70*l.* 12*s.*, currency, as appeared by the bill of costs presented to the Registrar for taxation, and filed in the cause on the 20th of September last; which sum the petitioners allege they are entitled to have and receive from the party, defendants; but that the Registrar of the Court declined taxing the said bill of costs, for the reasons assigned in his report annexed to the bill; and they thereupon submit to the Court the following three several positions or articles. 1. The establishment of the table of fees on the 27th of June, 1832, by virtue of the powers vested in His late Majesty under the 2 Wm. 4, c. 51, and its entry and enrolment in the public books of this Court, pursuant to the requirements of that statute. The petitioners go on in this article to allege that since the said entry and enrolment, the said table of fees has

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not been altered, nor has any new table of fees been made, ordained, and established, nor entered and enrolled: that the aforesaid order of His late Majesty in His Privy Council of the 20th of November, 1835, annulling, rescinding, and making void the said table of fees is illegal, no such power, as it is said, being granted by the said Act: in consequence whereof the table of fees so entered and enrolled was and still is in full force and effect, and by which the Registrar of this Court might have taxed the bill of costs in question.

2. The petitioners in their second article set forth that the said table of fees is much more equitable, although higher in its charges than the table of fees acted upon previous to its establishment and enrolment; and that the aforesaid Order of His late Majesty in His Privy Council, of the 20th of November, 1835, was made with the intention that the table of fees previously in force, should again be acted upon as being less burthensome upon suitors. The petitioners then proceed to set forth that, admitting the order to be legal, and that His late Majesty in His Privy Council had the power to annul the aforesaid table of fees of the 27th of June, 1832, then that the table of fees previously in force, and acted upon up to the entry and enrolment of the first-mentioned table of fees, to wit, the table of fees established in the year 1809, by the then Judge of this Court, came into force and effect; and that the bill of costs in question had been corrected as near as possible conformable to the last-mentioned table of fees, by which the Registrar of the Court might have taxed the same. 3. The third article proceeds upon the admission that neither of the above tables of fees is now legally in force; and alleges that in such case this Court has the power to award and tax a *quantum meruit* to its officers for the services by them rendered in the causes pending before it; and that unless this Court exercise such power it will amount to a total denial of justice.

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The petitioners conclude this article by the allegation that the bill of costs in question is but a *quantum meruit* for the services rendered in this cause and mentioned in the bill; and infer from these premises that as such *quantum meruit* the Registrar of the Court might have taxed the said bill of costs. They pray in consequence that this bill of costs may be taxed and signed by the Judge, as justly and truly due and owing to them by the defendants. The defendants by their reply allege that the before-mentioned table of fees of the 27th of June, 1832, has been abrogated and set aside by competent authority. That previous to and since the establishment of that table, there was no table of fees legally established for this Court, or enrolled therein; and that no table of fees was ever established or enrolled in the Court, whereby the Judge of the Court in the year 1809, could or did authorise the taking of fees. That in the absence of a table of fees established by legal authority, it was not competent to the Registrar, or to the Judge, to tax costs as a *quantum meruit* or otherwise; and consequently that the Registrar had acted legally in refusing to tax the said bill. Lastly. The defendants plead that if there were a table of fees legally existing in the said Court, the charge of the marshal in the bill for custody, amounting to 32*l.*, would be exorbitant, even if the marshal had had the custody of the effects upon which salvage had been claimed and allowed; whereas it is alleged by the defendants that, in truth and in fact, the marshal never had the custody of the same, but that the custody thereof was in the defendants, by whom no charge was made or intended to be made against the marshal or the petitioners. In support of the last article in the defendants' reply affidavits have been put before the Court, from which it appears that the articles, upon which salvage was claimed, were in the actual custody of the defendants or their agent, and not of the marshal,—

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the constructive custody, being in the marshal,—as there had been no formal release of the attachment. In this state the act on petition is concluded and brought in.

With respect to the last article in the defendants' reply, the claim therein referred to depends upon the general question of the power of the Court to award fees. By the concurrent statement of both parties, it appears that no expenses were incurred by the marshal for the custody of these articles; and his claim therefore must be for a fee of office, by reason of the custody. I proceed then to consider the general question brought under the consideration of the Court by the act on petition before me.

It will at once be seen that the claim of the petitioners for the allowance of fees in this cause is presented by them under three several aspects, and as due to them. 1st. In virtue of the table of fees, established by His late Majesty in Council, of the 27th of June, 1832, which the Order of His late Majesty in Council of the 20th of November, 1835, rescinded, or purported to rescind. 2ndly. In virtue of the table of fees which it is said was established in 1809, by the then Judge of this Court. And 3rdly, and lastly, as a *quantum meruit*, to the officers of the Court for the services by them rendered. Before proceeding to examine the several positions of the petitioners it will be proper to refer to some general principles relating to fees by which the power of this Court, in common with all other of Her Majesty's Courts, must be controlled and governed. The establishment of fees to be taken by the officers of government is really an act of legislation, and even of taxation. For, it is declaring that the officers shall not be obliged to discharge the duties of their respective offices, for the benefit of the people, and for carrying on the administration of government, unless the people will, for every act of duty in their respective offices, pay them such and such stated sums

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of money. It is true that a distinction is to be made between the fees paid to the officers of government for acts done in the administration of justice, and in the execution of other necessary branches of civil government; and fees paid to them for acts done by the mere grace and favour of the Crown, as in granting waste lands, and other acts of mere spontaneous bounty, and not of obligation. As to these last, the monies received under the name of fees, are paid as incident to, and a condition of the gratuitous grant on the part of the Crown. But the case is different with respect to such acts as are to be done in the administration of justice, or the execution of other necessary branches of civil government, which the king is bound by his office of king and his coronation oath to administer and execute for the benefit of all his subjects. The imposing upon his subjects the condition of paying fees for these acts of government, would be neither more nor less than selling them the benefits of the administration of justice and civil government, at the price he thought proper to fix; which would be directly contrary to a very important clause in the famous great Charter of England, which is expressed in these few but significant words, *nulli vendemus, nulli negabimus aut differemus rectum vel justitiam*. And this rule was so strictly observed that, by the ancient law of England, "none," says my Lord Coke, "having any office concerning the administration of justice, should take any fee or reward of any subject, for the doing of his office; to the end he might be free and at liberty to do justice, and not to be fettered with golden fees as fetters, to the suppression or subversion of truth and justice, and therefore the statute Westminster 1 (3 Edw. 1), prohibiting coroners from demanding or taking anything of any man to do his office, upon pain of great forfeiture to the king, was made in affirmance of the commor. law (a). And again, by the

(a) Co. Lit. 368; 2 Inst. 176, 208-9.

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26th chap. of the same statute it is provided, that no sheriff nor other the king's officer take any reward to do his office, but shall be paid of that which they take of the king; and he that so doth shall yield twice as much, and shall be punished at the king's pleasure." It has been remarked already, that the establishment of fees is an act of taxation, and they fall, therefore, under the general provision of the statute 34 Edw. 1, *de tallagio non concedendo*. The first chapter provides that "no tallage or aid shall be taken or levied by us or our heirs in our realm, without the good-will and assent of archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land;" and Lord *Coke*, who states that these words are plain without any sample, absolute without any saving *(b)*, expressly declares in his commentary upon this Act, that all new offices erected with new fees are within the Act, for that is a tallage upon the subject which cannot be done without common assent by Act of Parliament *(c)*; and he says elsewhere, "that the officers concerned in the administration of justice cannot take any more for doing their office than has been allowed to them by Act of Parliament, or by immemorial usage." And I presume that the immemorial usage referred to by him is, in this instance as in so many others, considered as evidence of a statute, or other legal beginning of the fee. These principles have, at all times, been recognised as fundamental principles of the law and constitution of England.

To apply these principles to the questions under consideration, it will be necessary to look at the subject of the fees in this Court historically. The first establishment of the Court itself took place almost immediately after the cession of the country to the crown of Great Britain; and as early as the year 1764, a

(b) 5 Co. Lit. 523.

(c) *Ib.*

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commission, bearing date the 24th of August of that year, was issued by General James Murray, appointing James Potts, Judge of the Court; which commission was superseded by another issued in the King's name, under the great seal of the High Court of Admiralty of England, bearing date the 28th of April, 1768; and the office has been continued, by a succession of commissions, down to this day. From 1764 to 1780, there are no records in the Registry, or documents showing what was done in that interval of time in relation to fees. In the last-mentioned year, the Governor and Legislative Council of the Province of Quebec,—being then the local legislature,—passed a temporary ordinance “for the regulation and establishment of fees,” including the fees to be taken in the Vice-Admiralty Court; which ordinance was continued by several successive temporary ordinances, the last of which expired on the 30th of April, 1790 (*d*). The records of the Court contain no information of the fees taken by the officers, in the interval between the expiration of this continued ordinance, and the table of fees referred to by the petitioners, as having been established in the year 1809, under the authority of the then Judge of this Court, and which was generally acted upon by him down to the passing of the 2 Wm. 4, c. 51, and the promulgation of the table of fees of the 27th of June, 1832. From this period down to the Order in Council of the 20th of November, 1835, this table of fees was of course acted upon; and upon the last-mentioned order for rescinding it being received, the deputy of the then Judge of the Court,—who discharged the duties of the office *ad interim* during the absence of the Judge,—allowed certain fees to the officers of the Court as a *quantum meruit*, without reference, as I believe, to any particular tariff or table of fees. Very soon after entering

(*d*) 20 Geo. 3, c. 3; and 27 Geo. 3, c. 7.

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on the discharge of the duties of Judge of this Court, to which I was appointed on the 21st of September, 1836, my attention was called to the consideration of this subject in the case of the John and Mary, wherein, after hearing counsel and giving the best consideration I could to the subject, I decided that since the passing of the 2 Wm. 4, c. 51, the establishment of fees in the Vice-Admiralty Court here was exclusively in the King in Council; and that the table of fees established under that statute having been revoked without making another, it was not competent to the Court to award a *quantum meruit* to its officers (e). The subject is now anew brought under the consideration of the Court in a more formal way, with a view, as I presume, to obtain an adjudication thereupon by the Queen in her Privy Council, which I shall rejoice at, as being calculated to set the question definitively at rest by so high a tribunal.

I have seen no reason to alter the opinion which I had formed, and expressed in the case of the John and Mary, and do not feel myself authorised to sanction the taxation of the bill in question, except as to certain expenses, amounting to the sum of 4*l.* currency, which indeed are admitted by the defendants.

The first article in the petition proceeds on the ground that the table of fees established by His late Majesty in Council of the 27th of June, 1832, continued in force, notwithstanding the Order in Council of the 20th of November, 1835, rescinding the same, which it is maintained is illegal. The statute under which this table of fees was established enacts, that it shall be lawful for His Majesty, with the advice of His Privy Council, to make, ordain, and establish tables of fees to be taken or received by the judges, officers, and practitioners in the said Courts for all acts to be done therein; and also from time to time, as shall be found expedient, to alter any

(e) See the case of the John and Mary, 26 Oct. 1836.

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such tables of fees. The argument of the petitioners on this head, as I understand it, is that a power being thus vested from time to time, "to alter" tables of fees established under the authority of this Act, and to make new ones, does not contain in it the power of rescinding an existing table without substituting another in the place of it. This argument appears to me to proceed upon the assumption that the power conveyed by this statute is to be governed by the same rules, and to be construed with the same strictness, as the law applies to powers granted by one private individual to another private individual, in relation to private property and the disposal of it. The reasons and motives of the law applicable to this last class of cases, do not at all extend to or embrace high administrative powers, vested by the legislature in the supreme executive authority of the state. As to these last, the construction must be of the most large and liberal character to give effect to the discretionary authority delegated by the legislature; and it would be too much for this Court, from a nice verbal scrutiny of the terms of the statute, to act upon a table of fees as of binding force, which had been rescinded by the same high authority which originally established it. The establishment of this table was manifestly tentative and experimental; the order rescinding it is obviously predicated upon the principle that it required to be altered *funditus*, and that a totally new table should be substituted in its place; and there is nothing which requires that the rescision of the one table, and the substitution of another more consonant to public convenience and policy, should be contemporaneous acts. I have no hesitation, therefore, in holding, that the order of His late Majesty in Council of the 20th November, 1835, had the effect of absolutely rescinding and annulling the table of fees established by the same authority on the 27th June, 1832.

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The second involves the inquiry, whether the repeal of the table which had been so established by His Majesty in Council, had the effect of reviving the antecedent table or scale of fees of 1809, made by the Judge who then presided over the Court. The rule that the repeal of a repealing statute has generally the effect of reviving the original statute, does not seem to be applicable to a case like the present one. In the case of a statute, the original statute, the repealing statute, and the Act repealing the repealing statute, all emanate from the same comprehensive and uncontrolled source of power, in the two last cases dealing with its own acts. In this case the legislature delegates its power, as to the establishment and regulation of the fees to be taken in the Vice-Admiralty, absolutely to the King in Council; and declares that the fees established and to be established by this authority, shall alone be demanded, received, and taken. It would seem by this provision, the power vested was exclusive; and the repealing of any given table of fees established under the statute could not divest, for a time even, the power so given to His Majesty in Council, which was a continuing power. By the repeal of a repealing statute, the latter comes to be for the future as if it had never been; and of natural consequence the original statute comes into operation, unless there be something that manifests the intention of the legislature that the former statute should continue repealed. If the same form of reasoning be applied to a permanent statute like the present, itself unrepealed, conveying a permanent power of regulation, which power once exercised has been temporarily intermitted, it will hardly be found to hold. If, however, the Order in Council of the 20th of November, 1835, could be considered as having the effect of reviving any pre-existing table of fees, it could only be as to a table of fees which had been legally established. Now, the table of 1809

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was made under the sole authority of the Judge of the Court; and with every possible respect for the enlightened Judge who then sat in this Court (f), I have never entertained any doubt that he had no authority to establish this table; for nothing is more certain than that "no Court has a power to establish fees; the Judge of a Court may think them reasonable, but that is not binding" (g). We are, perhaps, not justified in considering that the Judge did attempt to exercise this power. The defendants having put in issue the promulgation of this table, I have felt it my duty to direct the Registers of the Court to be searched, and the copy in the Registry does not appear to have been signed by the Judge. Whatever, therefore, might have been the effect of the Order in Council of the 20th of November, 1835, in reviving a table of fees which had been before legally established, it cannot have the effect of giving validity to a table of fees like that of 1809, which at no time had legal force.

The only remaining question is, whether after the passing of the statute 2 Wm. 4, c. 51, and the establishment of the table of fees of the 27th of June, 1832, and the annulment of that table by the order of the 20th of November, 1835, it is competent to the Judge of this Court to award a *quantum meruit*, as for fees, or in lieu of fees. All fees of office properly so called are presumed to have a legitimate foundation in some act of competent authority, originally assigning a fair *quantum meruit* for the particular service. Here the only competent authority to determine the amount of this *quantum meruit*, since the passing of the foregoing statute is His Majesty in

(f) Hon. James Kerr; appointed by Letters Patent under the Great Seal of the High Court of Admiralty of England, on the 19th of August, 1797; and con-

tinued in office until October, 1834.

(g) Gifford's case, 1 Salkeld, 333.

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Council. It is well known that previous to the passing of this statute, great complaints had been made of the fees allowed by the Judge as excessive, and the object of the statute was to prevent the future exercise of any such power, and to vest the regulation of the fees in this high authority. The terms of the statute are too clear to admit of doubt. It adds to the power given to the King in Council to regulate the fees, an express prohibition against taking any fees not so allowed. The words are "that the several fees so to be established, and no other, shall, from and after the making and establishment thereof, and the entry and enrolment thereof as aforesaid, be deemed and taken to be the lawful fees of the several judges, officers, ministers, and practitioners of the said respective Courts; and such fees only shall and may be demanded, received and taken accordingly." This provision is in conformity with the principles of the common law already adverted to, that the subject shall not be charged with any fees not sanctioned by the legislature. It is true that this general rule has, in practice, received a certain modification in the English Courts, but not to the extent stated by Hawkins (*h*). He says broadly that it cannot be intended to be the meaning of the statute already referred to, 3 Edw. 1, c. 26, to restrain the courts of justice, in whose integrity the law always reposes the highest confidence, from allowing reasonable fees for the labour and attendance of their officers. For the chief danger of oppression, he adds, is from officers being left at their liberty to set their own rates on their labour and make their own demands; but there cannot be so much fear of these abuses while they are restrained to known and stated fees, settled by the discretion of the Courts, which will not suffer them to be exceeded without the highest resentment; and he cites in support of this dictum

(*h*) B. 1, ch. 68, s. 3.

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the Year Books, 21 H. 7, 17, and Coke on Littleton, 368. The citation from Coke on Littleton has already been referred to, but does not by any means warrant the position of Hawkins; and I do not find the citation from the Year Books in the place referred to, nor any note of it in the index. Besides, the position stated as it is by him, is contradicted by Gifford's case, which is recognised as law in all the subsequent cases. At the same time that the power of the Court to establish fees is denied, it is said in this last case that if on a *quantum meruit* a jury think them reasonable, then they become established fees, and the case of *Veale v. Prior* is cited from Hardres, 351. Again in *Ballard v. Gerrard* (i), Lord Holt expressly says, that no Court has a power of settling the fees of its officers, but thus far they may go as to judge what are reasonable fees; the judge's assessing them reasonable may be good but not conclusive evidence to a jury, and so of the table of the usual fees of a Court not newly erected, and after it is once found reasonable by a jury then it may become conclusive; and cites the before-mentioned case of *Veale v. Prior*. The same principle is recognised in *Johnson v. Ley* (k), and in other cases. In none of these cases had the legislature appointed a particular manner in which the fees were to be regulated and established; and I should therefore not feel myself borne out by these cases, in deviating from the great salutary principle of the common law,—affirmed, as I understand it to be, by the stat. 2 Wm. 4, c. 51,—and granting upon my own authority a fee as a *quantum meruit*. At the same time, I rejoice that the power of regulating the fees of this Court has been placed where the legislature has placed it, and that the table of 1809 should have been superseded.

I must say that if I had been called upon to establish

(i) 12 Mod. 609.

(k) Skin. 589.

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a *quantum meruit*, I could not have sanctioned charges like those contained in this bill, which purport to be predicated upon that table, and are exceedingly exorbitant. The whole amount of salvage found to be due is 41*l.* 1*s.* currency. The proceedings in the cause consist simply of an affidavit and arrest, tender of this amount, and acceptance of it; and the fees claimed for the proctor of the petitioners, registrar and marshal, upon these summary proceedings, are 70*l.* 12*s.* currency. If there had been a legally established table sanctioning such charges, they would have been vested rights, which I should not have touched. As it is, feeling that I have no power to award fees in this case, I must,—however I may regret the inconveniences, to which the officers of the Court are thereby subjected,—confine myself to the allowance of the 4*l.* charged in the bill for necessary disbursements, and dismiss the petition as to the remainder of the prayer (1).

(1) A new table of fees was established by an Order in Council, bearing date at the Court at

Buckingham Palace, the 2nd of March, 1848.

Tuesday, 31st October, 1837.

NELSON VILLAGE—POWER.

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In a cause of collision between two ships ascending the river St. Lawrence, the Court, assisted by a captain in the Royal Navy, pronounced for damages; holding, that when vessels are crossing each other in opposite directions, and there is doubt of their going clear, the vessel upon the port or larboard tack is to bear up and heave about for the vessel upon the starboard tack.

JUDGMENT.—*Hon. Henry Black.*

This is a case of collision between two ships ascending the river St. Lawrence together, and crossing each other's path whilst tacking upon opposite points with an adverse wind, on the night of the 13th-14th of September last. In this, as in most cases of this description, the enquiry distributes itself under several heads. It is either a case in which there is plainly no fault on either side, or in which there must have been fault which cannot be specifically ascertained and assigned, or in which the fault not only exists, but can be ascertained; and this last head is subdivisible into the cases in which both parties are to blame, and those in which the party inflicting the injury, or the suffering party, is alone in fault. These questions must be determined by reference to the rules of navigation, as applied to the facts disclosed in the evidence in the cause. The opinion of the Court will be founded chiefly on the nautical evidence, and it is with great satisfaction that the Court can refer to a gentleman of the experience and knowledge upon these points, of Captain Bayfield. He has examined the evidence, and being present at the hearing of the cause as assessor to the bench, will pronounce his opinion upon the facts so deposed.

HENRY W. BAYFIELD, Captain, R. N., commanding

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naval surveying service in the river St. Lawrence, then said—"I observe that it is established in evidence, that the weather was clear, the wind moderate, and the vessels mutually and plainly in sight of each other. I am therefore of opinion, that the exercise of a common degree of prudence and precaution would have prevented the collision, and consequently that the injury complained of cannot be considered as the result of accident. It is a rule universally received among seamen, and to be found in books on seamanship, that when there is doubt, the vessel upon the larboard tack is to bear up or heave about for the vessel upon the starboard tack. If, therefore, the vessels met, as alleged by the witnesses in support of the libel, the Nelson Village was bound to bear up and go to leeward of the Scotia, and nothing but inability to do so could relieve the Nelson Village from the fault of causing the injury done to the Scotia. But it is alleged by the sole witness on the responsive plea, that the Nelson Village was obliged to tack on account of being so near the Isle Bellechasse that she could proceed no further without running aground, that she was tacked in consequence, and that when she came round, and before she could get her sails filled with the wind on the larboard tack, the Scotia ran foul of her. Now, if the correctness of this statement could be admitted, it would follow that the Scotia ought to have tacked when she perceived the Nelson Village in stays, or in the act of putting about. But I cannot receive otherwise than with great caution the evidence of this witness, who was the prentice pilot in charge of the Nelson Village at the time of the collision, and consequently a party implicated. I will, therefore, briefly examine and compare his evidence with that of the witnesses in support of the libel. In the first place, two out of the four of those witnesses allege that the collision took place near the middle of the river, and consequently not near the Isle Bellechasse,

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which is situated near the south shore. Secondly, all the witnesses on the side of the libel, agree in asserting that the helm of the Scotia was put down when she approached near to the Nelson Village, this being borne in mind, together with the relative situations of the vessels just before the collision, it is difficult to conceive how the Scotia's bowsprit could have been carried away, if the Nelson Village had not felt the wind on the larboard tack, and was, as alleged, motionless on the water. It seems, on the contrary, much more probable, that in that case her bowsprit would have been carried away, and that she would have received the most damage; for a vessel running on board of another in such a manner, and with sufficient force to carry away her own bowsprit and cut water, could not have failed to inflict most serious injury upon the other vessel so run on board of. Moreover, in the responsive plea it is stated, that the Scotia struck the Nelson Village on the quarter, whilst in the evidence in support of that plea it is stated, that the bowsprit of the Scotia went through the foresail and fore-rigging of the Nelson Village. These two statements are contradictory, they cannot both be true. But when I, in like manner, examine the evidence on the side of the libel, I perceive that the effect produced by the collision upon both vessels, was such as would very probably have taken place under the circumstances alleged in that evidence; for, if the Nelson Village did put her helm down instead of up, under the circumstances alleged in the libel, her carrying away the bowsprit and cut-water of the Scotia, as well as her own fore-rigging, is as easily conceivable as it is difficult to imagine under the circumstances set forth in the responsive plea. After weighing, therefore, deliberately the evidence on either side, and considering the superiority of the testimony on the side of the libel, I am of opinion, that according to the evidence adduced on this case, the fault rests with the Nelson Village alone."

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The COURT.—I adopt this opinion with perfect satisfaction, and assess the damage at 44*l.* 7*s.* 4*d.*, currency, being the actual expense of the repairs, to which the demand of the promoter is confined. The question of consequential damages is not before the Court. I beg to renew the expression of my thanks for the readiness with which Captain Bayfield has afforded his valuable assistance upon this, as upon a previous occasion, whereby the Court has been relieved from the necessity of pronouncing judgment upon a question connected with a science with which it is but little conversant, and the public secured in a just application of the rules of navigation to the facts of the case.

Gairdner, for the Scotia.

Bowen and *Montizambert*, for the Nelson Village.

Friday, 10th November, 1837.

SCOTIA—RISK.

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Although Justices of the Peace exercising summary jurisdiction be the sole judges of the weight of the evidence given before them, and that no other of the Queen's Courts will examine whether they have formed the right conclusion from it or not; yet other Courts may and ought to examine whether the premises stated by the Justices are such as will warrant the conclusion *in point of law*.

Change of the owners by the sale of the ship at a British port does not determine a subsisting contract of seamen, and entitle them to wages before the termination of the voyage.

JUDGMENT.—*Hon. Henry Black.*

The libel sets forth a hiring of the promoter on a voyage from the port of St. John's in the province of New Brunswick, to the port of Greenock in Scotland, and back to the port of St. John's or some other of the ports in North America, and a service under this hiring since the 26th of May last, from St. John's to Greenock, with a cargo which was there discharged, and a sale by the owners of the ship, at the last-mentioned port, to a third person; and that such third person had hired the old master, and divers other persons, as the crew of the ship, and sent her to this port, where she arrived about the 15th of September last, and discharged her cargo. That the ship is about returning to Great Britain, from whence it is the intention of the present owner to send her to the East Indies. The promoter proceeds to allege that the port of Greenock was a foreign port to the said ship at the time of the sale thereof, and was and still is a foreign port to the promoter, who resides at and belongs to St. John's, New Brunswick; and that being desirous of proceeding thence (thither), and the master having refused

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to pay him his wages, he instituted proceedings against the master for his wages, before Etienne Parent, Esquire, one of Her Majesty's Justices of the Peace for the district of Quebec, who, on the 17th October last, declared that the promoter had been, was, and is discharged from the ship, and ordered the master forthwith to pay him his said wages, amounting to 17*l.* 10*s.*, and costs; which order or judgment the master has since acquiesced in, paid, and discharged. That since the discharge of the promoter the master has refused to pay him his wages for ten days succeeding his discharge, by reason of which refusal the promoter has become entitled to two days' pay for each of the said ten days, making 2*l.*, for which, and for the tools, clothes and bedding of the promoter, detained by the master on board the ship, the present action is brought.

The defence to this action is contained in a responsive plea, wherein the master sets forth the hiring of the promoter at the time set forth in the libel, on an intended voyage from the port of St. John, New Brunswick, to the port of Greenock, thence back to a port or ports in British America or in the United States of America, and from thence back to a port or ports in Great Britain or Ireland, and back to a port or ports in British America or in the United States of America, making St. John's, New Brunswick, the port of discharge; and that the promoter signed articles for this voyage, and that the vessel is now in the prosecution of it.

The parties have filed an admission of the signing of these articles, of the sale of the ship at Greenock to the new owner, pending the voyage, and that the clothes, &c., are on board of the ship. The Justice's order for the payment of the wages of the promoter, referred to in his libel, is also produced, and is as follows:—

“Be it remembered that on the eleventh day of the present month of October, which is in the year of our

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Lord 1837, complaint on oath was made to and before me, one of Her Majesty's Justices of the Peace for the district of Quebec, residing in the city of Quebec, in the said district (near to the place where the ship or vessel hereinafter mentioned discharged her cargo, and where the master of the said ship then was and now is), in a case of seamen's wages by and on behalf of Cornelius Dempsey, late carpenter on board the ship or vessel called the *Scotia*, whereof Samuel Risk is master, against the said Samuel Risk, complaining that there is justly and truly due and owing to him, the said Cornelius Dempsey, the sum of 17*l.* 10*s.*, or thereabouts, of lawful Halifax currency, being a balance of wages due him for his services as carpenter on board the said ship from the 26th day of May last past to the 10th day of October instant, on a voyage from the port of St. John, in the province of New Brunswick, to the port of Greenock in Scotland, and from thence to this port of Quebec, at the rate or wages of 6*l.* currency per month, pursuant to an agreement entered into by the said Cornelius Dempsey with John Robertson, the owner of the said ship, through the agency of the said Samuel Risk; that the said John Robertson has ceased to be the owner of the said ship, whereby the contract between him and the said Cornelius Dempsey is dissolved; that the property and possession of the said ship is vested in another person, between whom and the said Cornelius Dempsey there never was, or intended to be, any privity of contract; that the said Samuel Risk neglects and refuses to discharge the said Cornelius Dempsey, and to pay him his said balance of wages, although often thereunto requested. And the said Samuel Risk, duly summoned to appear before me at the Court-house in the city of Quebec, on Thursday, the 12th day of said month of October then following; and on the said 12th day of October the said Samuel Risk appeared in person and by attorney to answer the said complaint, and

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with the consent of the parties the hearing of the said complaint was continued to the 14th day of the said month of October then following; and on the said 14th day of October, the said parties having again appeared before me, the said parties, to wit, the said Cornelius Dempsey and the said Samuel Risk, were duly examined on oath touching the said complaint, and the amount of wages due, and the said parties heard by their respective counsel, and with the consent of the said parties, the said complaint was again continued for further hearing to the 17th day of the said month of October then following. And on the said 17th day of October the said parties were again heard by their respective counsel on the merits of the said complaint, and I, the said Justice, having on the whole maturely deliberated, and it appearing unto me that the said Cornelius Dempsey has been and is discharged from the said ship or vessel Scotia, and the sum of 17*l.* 10*s.*, Halifax currency, is of right due and payable to him for his services on board the said ship or vessel as aforesaid, and it appearing unto me reasonable and just, did order, award and decide, on the said 17th of October, that the said Samuel Risk, do forthwith pay to the said Cornelius Dempsey, the said sum of 17*l.* 10*s.*, Halifax currency, to wit, lawful current money of the province of Lower Canada, as and for the balance or amount of wages due and payable to him for his services on board the said ship or vessel as aforesaid; and the further sum of 1*l.* 17*s.* 6*d.* current money aforesaid, as and for the costs, charges, and expenses incurred by the said Cornelius Dempsey, in the making and hearing of the said complaint. In witness whereof, I have hereunto set my hand and seal at the city of Quebec, this 17th day of October in the year of our Lord, 1837, and of Her Majesty's Reign the first. E. Parent, J. P." (L. S.)

The first question which arises upon the issue and evidence in this cause is, whether the Court is so far

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bound by the proceedings had before the Justice of the Peace as to be precluded from entering into the inquiry of the effect of the sale of the ship upon the contract of the promoter, and as to be under the necessity of awarding restitution of the clothes without entering into the consideration of the circumstances preceding that order. If this question be determined in the affirmative, then there is an end of the cause; if in the negative, then a second question arises, and that is whether the change of owners at Greenock had the effect of discharging the promoter from his contract.

Upon reference to the cases it might be concluded that the fact of jurisdiction in cases of summary and limited jurisdiction like the present is controvertible in other courts (*a*); and it is certain that the Justice cannot give himself jurisdiction in a particular case, by finding that as a fact, which is not the fact (*b*). If I were called upon to assume a jurisdiction in the Justice of the Peace upon the present occasion, not to be controverted in this court, I should feel it necessary before adopting any conclusion, predicated upon such jurisdiction in the Justice of the Peace, deliberately to weigh various circumstances in the order itself. 1st. The voyage set forth in the complaint and order is a different voyage from that admitted by the parties in this cause. 2ndly. The complaint expressly negatives an actual discharge by the master, setting forth as the cause of complaint that the master neglected and refused to discharge the promoter, and to pay him his wages; and the conclusion therefore of the Justice, that the promoter had been and was discharged from the ship, could be understood not of an actual discharge by the master, but of a constructive discharge by mere operation

(*a*) *Terry v. Huntington*, Hardr. 480; *Fullers v. Foteh*, Holt. 287; *Carthew*. 346; *Paley on Convictions*, p. 337.

(*b*) *Per Lawrence, J., Welsh v. Nash*, 8 East, 394, 403; *Paley on Convictions*, p. 337.

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of law, proceeding from the sale of the ship. 3rdly. The order, not containing any of the examinations or evidence, this Court has no means of knowing whether the fact of the pendency of the voyage was before the Justice or not; nor any means of comparing the facts with the legal conclusions derived from them. Now, although Justices of the Peace be the sole judges of the weight of the evidence given before them, and the Court will not examine whether they have formed the right conclusion from it or not, yet by setting out the whole of the evidence, an opportunity is afforded of ascertaining whether the premises are such as will warrant their conclusions in point of law (c). But it does not appear to me to be necessary to enter into these matters upon the present occasion, for the only matter directly adjudicated upon by the Justice is the matter of the wages. When the promoter calls upon this Court for the interposition of its authority to enforce another claim, to wit, the claim for the restitution of the promoter's clothes, this Court must see with its own eyes. In no form can it be made ancillary to the Justice's court (d); still less can it be required to adopt without examination, as legal premises on one demand, those premises which the Justice's court may have adopted as legal premises on another demand. This would be true if the whole voyage had been set forth, and had been shown to have been before the Justice at the time he gave his order; but from the order itself this appears otherwise, the complaint setting forth a voyage terminating at this port, and the admission in the present cause showing a subsisting voyage whereof this was only an intermediate port. I think, therefore, the Court is bound to proceed to the consideration of the question secondly put, and to ascertain, according to the best lights in its power,

(c) *Rex v. Selway*, 2 Chit. R. ed., p. 166, in note.
522; *Paley on Convictions*, 2nd

(d) *The Phœbe*, 22 Oct. 1836.

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whether the sale of the said ship at Greenock had the effect of determining the contract of the seamen there.

In support of the position of the promoter that the sale of the ship at Greenock had the effect of determining the contract, he refers to the 148th and 149th *capitoli* of the *Consolato del Mare* which are referred to, but historically only, by Browne (e), and are as follows: "*Se patrone di nave venderà la nave o altro, che la potesse vender ad alcuno, che non ci havesse parte, tutto il salario si debbe pagare a i marinari, e sono liberi, e se li marinari sono in loco, che non volessino navicare, il patrone, o quello che la nave haverà venduta è tenuto di fare le spese à marinari insino che sieno tornati in quel loco di dove si partirono;*" and "*Se nave o navilio si venderà in terra d'infideli, il patron del navilio debba dar navilio, e vettocaglia a' marinari insino che siano in terra de' christiani, dove possino havere recapito.*" The same code contains two other articles declaring that the change of master shall of itself operate as a discharge of the seamen (f). The two former of these articles which are in the same spirit as the two latter, seem to contemplate a change of master,—for such is the import of the term *patrone*, even now in the Mediterranean States (g), with whom this body of laws originated,—and a termination of the adventure, and a refusal to continue further with the ship. Now, although doubts may in older times have been entertained as to the continuance of the contract of the seaman upon a change of the master (h), yet nothing is better settled in modern times than that the seaman, notwithstanding the change, continues bound to complete his original engagement, the contract itself being considered as a contract with the ship (i). With still less

(e) Law of the Admiralty, vol. 2, p. 163.

(f) Cap. 158, 294.

(g) Institution au Droit Maritime, par Boucher, p. 104, s. 359.

(h) Consolato, cap. 158, 294.

(i) Boulay Paty, Cours de Droit Commercial et Maritime, tome 2, p. 182. Pothier, Du Louage des Matelots, No. 176; Institution

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semblance of reason could it be held that a change of owners, the master and voyage remaining the same, could have the effect of determining the contract with the seamen. The liability of the original owner and of the master to the seamen under the written articles remained unimpaired by the sale, the security on the ship continued the same, and there is probably superadded the additional security of the new owner. If the rule of law were otherwise, we should find this form of determining the contract specially pointed out by the writers on maritime law, as well English as French and American, whose silence affords decisive proof that the principle contended for on the part of the promoter is not sanctioned by any legal authority. But if it were even conceded that upon the sale it became optional with the seaman to proceed with the ship, that option could only be declared at the port where the sale took place, and the seaman voluntarily proceeding with the ship must be understood to have waived any right to a discharge by reason of the sale. Upon these general and obvious principles of maritime law, it is clear that the sale at Greenock had not the effect of determining the contract. There is a statutory provision to be found in the late Seamen's Act (*k*), having relation to the seamen belonging to ships sold in ports out of Her Majesty's dominions, but the provisions of this statute do not in any manner invalidate the foregoing conclusion. It is enacted, "That whenever any ship whatever belonging to any subject of the United Kingdom, except in cases of wreck or condemnation, shall be sold at any port out of His Majesty's dominions, the master in all such cases (unless the crew in the presence of the British consul or vice-consul, or in

au Droit Maritime, par Boucher, (k) 5 & 6 Wm. 4, c. 19, s. p. 182, No. 648; Kuricke, p. 697, 17.
art. 4, tit. 2. Valin, i. p. 532.

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case of there not being any such consul or vice-consul, then in the presence of one or more British resident merchants at such port, shall signify their consent in writing to be there discharged) shall, and he is hereby required, besides paying them the wages to which they shall be entitled under the agreement, either to provide them with adequate employment on board some other British vessel homeward bound, or to furnish the means of sending them back to the port in His Majesty's dominions at which they were originally shipped, or to some port in the United Kingdom, as shall be agreed upon, by providing them with a passage home, or depositing with the consul or vice-consul such a sum of money as shall be by him deemed reasonably sufficient to defray the expenses of their subsistence and passage; and if the master shall refuse or neglect so to do, such expenses when defrayed shall be a charge upon the owner whose ship shall be so sold, except in cases of barratry, wreck, or condemnation, and may be recovered against such owner as so much money paid and expended on his account, together with full costs, at the suit of the consul or other person defraying such expenses, or of His Majesty's Attorney-General on behalf of His Majesty, in case the same shall have been allowed to the consul out of the public monies" (1). This section relates to sales in ports "out of the Queen's dominions," and is in advancement of the public policy relating to seamen, securing their services to British shipping to the exclusion of foreign shipping; and even then all that the master is bound to do, is to furnish them with adequate employment on board some other British vessel homeward bound, or to furnish the means of sending them back to the port in Her Majesty's dominions at which they were originally shipped, or to some port in the

(1) The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, s. 205) makes similar provision.

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United Kingdom. I have entered the more fully into the grounds of the present judgment, as it is of importance that the rule of law upon this subject should be distinctly known, and as I am anxious it should be understood that there is no disposition on the part of this Court to interfere in any form with the decisions made by the Justices of the Peace in the execution of powers conferred upon them by the Merchant Seamen's Act, to enforce against masters of ships the payment of the wages of their seamen.

Being of opinion that the contract of the promoter is a subsisting contract with the ship, notwithstanding the sale of her, I am bound to dismiss the present suit, which I accordingly do (*m*).

(*m*) L'ordonnance ne fait aucune différence entre *Patron* et *Capitaine*. Mais dans l'usage, "on appelle capitaines ceux qui commandent sur les vaisseaux du Roi équipés en guerre: on donne le même nom à ceux qui commandent sur les vaisseaux des armateurs qui obtiennent des commissions pour avoir la liberté de faire des prises sur les ennemis, ou de les rançonner. On nomme aussi capitaine, celui qui commande sur un vaisseau marchand destiné à un voyage de long cours; mais ceux qui commandent sur des barques marchandes, ou sur des vaisseaux marchands qui ne font pas de long trajets, se nomment, sur l'Océan, *Maîtres*; et sur la Méditerranée, *Patrons*."—

Praticien des Juge et Consuls, p. 386.

Targa, cap. 12, n. 43, dit que ceux qui commandent des barques et autres bâtimens destinés pour le petit cabotage, sont de simples Patrons de navigation, et qu'il y a une extrême différence entre ceux-ci et les Capitaines. *Chi li commanda, non è propriamente capitano, mà patron di navigazione; e vi è differenza, come dal cavallo all'asino: che se ben tutti son quadrupedi, neinte di meno il primo è destinato per cavagliere, il secondo per cavallari da condotta; quello porta la sella questo il basto.*

Emerigon, ch. 7, sect. 5, Tome Premier, p. 103.

Tuesday, 28th November, 1837.

THE TORONTO.—COLLINSON.

THE TORONTO. Assault and battery and oppressive treatment by the master of a ship upon a cabin passenger. Charge sustained.

JUDGMENT.—*Hon. Henry Black.*

This is a cause of damage for an assault and battery, committed by the defendant upon the promoter, John Frederick Sparke, late an officer in the 95th regiment of foot, upon the high and open seas, on board of the Toronto, whereof the defendant was master, the promoter being a passenger on board that vessel, on the 6th of September last. To this suit the defendant has pleaded. 1st—That on the occasion in question the promoter and the other passengers had made use of language and expressions intended and calculated to irritate the defendant, and then said, “we are in a good ship, but she is badly conducted;” “we have a good ship, if we only had a better commander.” 2ndly—That at the time mentioned in the libel, the promoter was marking the quarter deck of the ship with chalk for the purpose of playing a game called hop scotch; that the defendant stated to him that the game had been complained of, to him the defendant, by several of the other cabin passengers; and, that as he the defendant was in authority for the benefit of all, he would not have the ladies in the cabin annoyed by its being played on the quarter deck, but that if the promoter wished to play at that game, he might do so on the main deck. That one of the passengers on the quarter deck then said in a sneering and irritating tone, “I suppose you will allow us to walk on the quarter deck;” to which the defendant replied, “that

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is a question which requires no answer;"—that thereupon the promoter said, in a tone and manner intended to insult and irritate the defendant, "I suppose you will permit us to go down to the cabin," to which the defendant replied, "not unless you conduct yourself as a gentleman;"—that the promoter then said, "I have paid for my passage and shall do as I like here, and what is more, I defy you (meaning the defendant) to prevent me." In saying these words the promoter came towards the defendant, stamped on the deck, and swinging round his arm brought his hand or fist close to the face of the defendant;—that the force with which he swung his arm caused him to turn round on his heel, and thereupon the defendant put his hand on his shoulder and slightly pushed him off;—that in giving the said push the defendant used his left hand, which was open. 3rdly.—That immediately afterwards some of the passengers went below, and the defendant was standing in the companion; that the promoter rushed towards him, and attempted with violence to put him aside; that the defendant, being thus attacked, resisted the attempt, and that the promoter then went below into the cabin, and was not prevented from gaining access thereto as the promoter alleges in his libel.

The evidence in the cause consists of the depositions of nine witnesses, whereof six were produced on the part of the promoter, and three on the part of the defendant.

Of the witnesses on the part of the promoter five were cabin passengers on board the Toronto with the promoter. These were Mr. Tylden, a captain in the Royal Engineers; Mr. Scriven, of Leeds, in England; Mr. Cusack, a graduate of the University of Cambridge, admitted since his arrival here to holy orders in the Church of England; Mr. Thomas Moore, also a graduate of the same University; and Mr. William Smith Burrage, of

THE TORONTO. Norfolk, in England. The sixth witness, Mr. John Paddon, was a steerage passenger, and speaks to the single fact of the defendant having resisted the promoter's entry into the cabin. The other witnesses were present at and give the transaction from beginning to end. According to them they were, on the day when the assault complained of was committed, about to engage in a game called shuffle board; which consists in having a certain number of squares chalked in a parallelogram upon the deck, numbered from one to ten, and sliding a piece of wood into the squares from a certain distance;—a game which it appears had been previously played on the same voyage, without being objected to by the defendant. The promoter was in the act of chalking these squares on the quarter-deck, when the defendant came from the cabin, or from another part of the vessel, and, addressing the promoter rudely, told him that he would have no hop scotch there, and to rub out the chalk again; which the promoter refused to do, saying that the defendant might let one of his men do it. Upon which Mr. Tylden observed, "I suppose soon we shall not be allowed to walk the quarter-deck:" whereupon the defendant said that the promoter had no right to be upon his quarter-deck, as he was not a cabin passenger; which was denied by the promoter, saying that he could show the defendant's receipt for it, and that he had a right to go where he pleased in the ship. The promoter seems then to have been making a turn upon the quarter-deck—as to exercise the right which he claimed to be there,—when the defendant seized the promoter by the collar of his coat, and attempted to shove him off the quarter-deck, in which he was unsuccessful. The promoter, extricating himself, turned his back to the defendant, and, addressing the gentlemen present, called upon them to bear witness to the assault; upon which, at the instance of Mr. Tylden, the passengers, with the exception of the

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promoter and Mr. Scriven, retired below, to speak together upon the occurrence which had just happened. Mr. Tylden returned to the deck, and addressing Mr. Scriven, requested him to come down; and as Mr. Scriven was in the act of descending the companion stairs, the promoter came round to go down before, and the defendant opposed his going down, saying, "you shall not go down, Sir;" upon which the promoter answered, "I will, Sir;" and was in the act of descending, when the defendant pushed him in the corner of the companion, and seized hold of him to prevent him from going down into the cabin; at which moment Mr. Moor, the mate of the ship, and Mr. Kent,— who was coming out in the ship to take the command of her here after her arrival, and has since done so,—came up and laid hold of the promoter by the arms, but desisted upon the remonstrance of Mr. Scriven; and the promoter, then extricating himself from the defendant, went into the cabin. The defendant followed him into the cabin, insisted upon being present, but did not subsequently renew his assault upon the promoter; and it is therefore not necessary to state what occurred in the cabin, except to say, that the passengers came to the resolution of not speaking to the defendant during the remainder of the voyage, upon his refusal to apologize to the promoter. The promoter, upon being applied to respecting the nature of the apology, expressed himself ready to accept any apology which met the approbation of Lieutenant Tylden and Mr. Cusack.

The witnesses offered on the part of the defence were Mr. Kent, Mrs. Barnard, a lady who was a passenger on board the vessel, and Mr. James Moor, the mate. The testimony of Mr. Kent, and Mr. Moor, contains an account of a conversation between the passengers upon the quarter deck, immediately before the defendant's coming up and prohibiting them from proceeding with

THE TORONTO. the game; the defendant being at the time of this conversation within the hearing, but not in sight, of the parties to it. The Toronto at this moment had not much sail set, the crew being engaged in shifting her sails, and bending new sails in lieu of the old ones, which she had been down to that time carrying. A vessel passing in full sail at this time, Mr. Tylden observed to Mr. Kent that he, Mr. Kent, would have topgallant sails enough to use going home, as the defendant did not seem to intend to use them on the voyage out; to which Mr. Scriven added that the Toronto was a good ship, but badly commanded, according to Mr. Kent's statement; but according to Mr. Moor, the passengers said that certainly the ship was a good ship, without his hearing them speak of the master. He heard them say that the sails and rigging were bad, and he understood, from the way they spoke, that their conversation implied that the fault was in the defendant, as he did not carry more sail. Neither of these witnesses say that the promoter individually took any part in this conversation. Both concur with the witnesses for the promoter, in stating that the defendant denied to the promoter the privileges of a cabin passenger, and that he pushed the promoter, ordering him off the quarter-deck; that he afterwards attempted to hinder the promoter from going into the cabin, by standing in his way, and holding him by his clothes. The conduct of the promoter, as represented by these witnesses, upon his right to be on the quarter-deck being denied by the defendant, was less temperate than it is represented to have been by the promoter's witnesses. Mr. Moor says, that upon Mr. Tylden's saying he supposed they would not be allowed to walk the quarter-deck, the promoter took it up, and stamping upon the deck, and swinging his hand within a foot or eighteen inches of the defendant's face, said that he had paid his passage in the ship, and would do as he thought proper.

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Mr. Kent makes the same statement, with this difference, that according to him this stamping upon the deck by the promoter, instead of occurring immediately after Mr. Tylden's observation, occurred afterwards, and concluded an angry conversation respecting the right of the promoter to the privileges of a cabin passenger. The remaining witness, Mrs. Barnard, on the part of the defence, gives a very plain and temperate account of the transaction as it fell under her observation. She was standing, or rather leaning against the companion when the promoter was chalking the game upon the deck at the request of the other passengers. She heard no conversation at this time between the passengers respecting the sailing of the ship, but had often, from the time the ship had left London, heard them say that the ship did not carry sail enough. The first thing she saw was the defendant coming on deck, and saying that he would not allow the passengers to play the game that the promoter was in the act of chalking, and that he had told them so before; and they replied that it was not that game that they were about to play, but another that would make no noise. She cannot recollect all the conversation that passed between them, but thinks that the defendant spoke too angrily to the promoter in the first instance, and that the promoter resented it by speaking angrily to the defendant. In this conversation the defendant said that the promoter was no cabin passenger, and desired him to go on the main deck. The promoter refused to go, seemed very angry, and defied the defendant to send him on the main deck. She did not see him put his hand near the defendant's face, as she felt grieved at the quarrel, and turned away. Mr. Tylden, to the best of her recollection, maintained that the promoter was a cabin passenger, and the defendant insisted that he was not, and that he should leave the quarter-deck; and on the promoter's defying the defendant, the latter gave to the former a slight push

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on the back, which did not hurt him. The promoter then turned round, and called upon two of the passengers to witness that he had been assaulted. Mr. Tylden having then asked the passengers to go down below, and they having gone down, the defendant went between him and the companion door to prevent him, and said, "you shall not go down;" and the promoter replied, "I will." A scuffle then ensued upon the stairs, and the witness does not know what happened afterwards, but the promoter went into the cabin.

I have been thus particular in giving the facts, as stated by the different witnesses that I might be enabled to show wherein all the witnesses agree, wherein they differ, and to estimate as well the materiality of the points of difference, as the balance of evidence on the one side or on the other in relation to the points of difference.

There appears to be no doubt of the promoter's having come on board the Toronto as a cabin passenger, and that he was entitled to all the privileges of a cabin passenger. He appears to have come on board after all the berths in the cabin were taken up, and consented to sleep elsewhere. He paid the same price as the other cabin passengers. His station in life excluded the idea of his taking a passage of any other character. From the time that he came on board, down to the occurrence of the difficulty in question, he exercised all the rights and privileges of a cabin passenger, as of course, and as under the circumstances was to be expected. In the responsive allegation of the defendant it is not surmised that, in using the quarter-deck or the cabin, the promoter usurped a right which did not belong to him as a cabin passenger. All the witnesses agree in the statement that the defendant, upon the occasion of some words between the parties respecting a game which the passengers were about to play upon the quarter-deck,

denied the right of the promoter to be upon the quarter-deck, and attempted to push him from it: also, that upon the promoter's being about to go to the cabin, the defendant in like manner attempted to obstruct the promoter's passage to it. That the promoter did not upon either of these occasions use or menace any actual violence to the defendant, but satisfied himself with maintaining possession of his right in the quarter-deck and in the cabin, as a cabin passenger, against the actual violence of the defendant.

The defence of the defendant substantially rests upon two points; 1st—That irritating and provoking language had been used of him by the promoter; and 2ndly—That the promoter in declaring his determination to maintain his place upon the quarter-deck, came towards the defendant, stamped on the deck, and swinging round his arm brought his hand or fist close to the defendant's face, and thereupon the defendant put his open left hand on the shoulder of the promoter, and slightly pushed him off.

Although it seems agreed that at this day, no words whatsoever, be they ever so provoking, can amount to an assault, notwithstanding the many ancient opinions to the contrary (*a*); yet if very provoking language is given, without reasonable cause, and the party offended is tempted to strike the other, and an action brought, the Court would feel itself bound to consider the provocation in assessing the damages (*b*). It is therefore necessary to consider the words here set up by the defendant as a provocation to the act of violence complained of by the promoter. The witnesses on the part of the promoter seem to have little or no recollection of the conversation which immediately preceded the defendant's coming up to the passengers on the quarter-deck, and directing

(*a*) Hawkins, B. 1, c. 62, s. 1;
Bacon's Abridg. Tit. Assault and
Battery (A).

(*b*) Gwillim's edition of Bacon's
Abridg.

THE TORONTO. them not to proceed with the game which they were about to commence; which is not surprising, as that conversation, as given by Mr. Kent, and Mr. Moor, on the part of the defence, appears to be altogether immaterial, relating only to the quantity of canvass on the ship, containing nothing personally offensive to the defendant, and which could not have been intended to be a personal incivility to him as he was not in sight, nor so far as they knew in hearing. In this conversation too, such as it was, the promoter does not appear to have been an interlocutor, nor does the defendant at the time appear to have remonstrated with any of the parties concerning this conversation, or to have demanded any explanations respecting it. On the contrary, passing over the conversation entirely, he denies the right of the promoter to remain upon the quarter-deck, and attempts to push him from it. This then offers neither justification nor palliation for the act of violence complained of.

Then, as to the swinging round of the arm by the promoter. If we confine ourselves solely to the statements given by Mr. Kent and Mr. Moor, I should be bound to say that the facts, as given by them under this head, constitute no justification or palliation to the defendant. Moor states that the hand or fist of the promoter came within a foot or eighteen inches of the face of the defendant; Kent states that it came very near the defendant's face; and both say that it was thereupon that the defendant pushed the promoter. But it is not stated by either of them that the promoter's attitude was one menacing violence to the defendant, so as to support the plea of justification *son assault demesne*. To constitute such an assault as would justify moderate and reasonable violence in self-defence, there must be an attempt or offer, with force and violence, to do a corporal hurt to another; as by striking him with or without a weapon; or presenting a gun at him at such a distance to which

the gun will carry ; or pointing a pitchfork at him, standing within the reach of it ; or by holding up one's fist at him ; or by drawing a sword and waiving it in a menacing manner (c). But upon the statements of these witnesses themselves, it is apparent that the acts of violence complained of by the promoter, were done by the defendant not under any idea of defending himself, but to enforce his order prohibiting the promoter from having access to the quarter-deck or to the cabin. If then the case rested upon the depositions of these witnesses alone, I should feel myself bound to give judgment for the promoter.

THE TORONTO.

The authority of the master will always be fully supported by the Courts so long as it is exercised within its just limits. Here the conduct of the master was unjust and oppressive in attempting to deprive the promoter of his right to the use of the quarter-deck and cabin, and to subject him to the humiliation of being separated from the society of his fellow passengers, and placed in a situation generally appropriated to men of a condition inferior to his own. When, however, I look at the evidence of the fellow passengers of the promoter, who must have been exempt from every improper bias, and whose education and condition in life entitle them not only to full credit for veracity, but also to greater accuracy of observation and a quicker sense of the proprieties of life and conduct, I am bound in justice to the promoter, to say there was nothing intemperate in his manner or language, but that it was marked with a mixture of steady, well-regulated spirit, and great moderation, which does him much honour. When pushed by the defendant, in enforcement of his unjust denial of the use of the quarter-deck and of the cabin, he contents himself with maintaining his place, without himself resorting to violence, calling

(c) Hawk. B. 1, ch. 62, s. 1 ; Bacon's Abridg. Tit. Assault and Battery (A) ; 1 Ventris, 256.

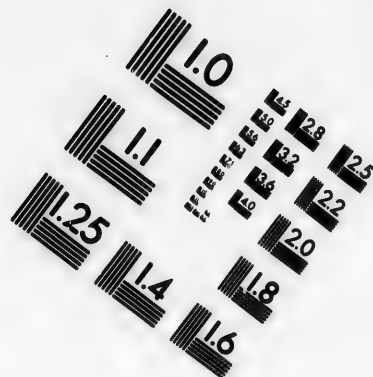
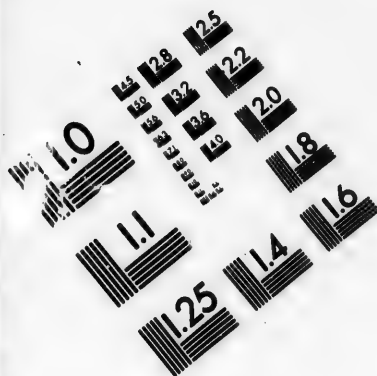
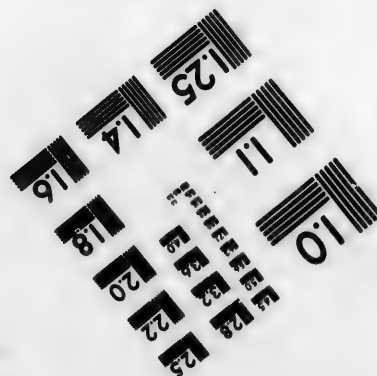
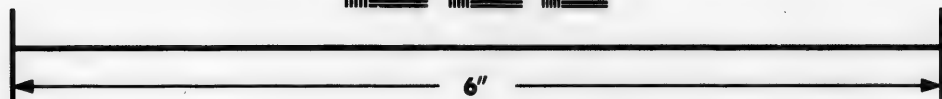
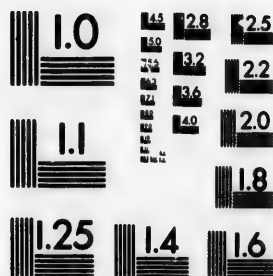


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upon two of the gentlemen present to bear witness to the assault to which he had been subjected. Though sworn to be not inferior in strength to any man on board the ship, he avails himself of his strength to make his way into the cabin, against the obstruction of the defendant, without using any personal violence to him. When he is asked as to the apology that might be required, he states his readiness to receive any apology which should meet the approbation of Mr. Tylden and Mr. Cusack, two of his fellow passengers; and during the remainder of the passage does not appear to have exhibited any marks of ill humour towards the defendant, confining himself simply to avoiding all intercourse with him. The defendant on his part appears to have given way to a momentary fit of ill humour, leading certainly to most unwarrantable conduct, but fortunately for him not followed by any actual deprivation of the rights belonging to the promoter as a cabin passenger, nor the humiliation of being separated from his friends and placed in an inferior part of the ship, from both which he appears to have protected himself by a conduct at once manly and temperate. With an obstinacy, which with some classes of men proceeds from a mistaken notion of spirit, the defendant refuses to make any proper apology, but does not appear to have followed up this act with any other acts of insult or oppression.

The case under all its circumstances does not seem to call for exemplary damages, which I presume are not the objects of the promoter by the present suit; and as there is no cruelty or continued oppressive conduct, I think the justice of it will best be attained by condemning the defendant to pay the promoter a sum in the name of damages equal to the sum which the promoter paid to the defendant for his passage, and I accordingly decree to the promoter the sum of 20*l.* sterling (*d*).

(*d*) Conduct unbecoming a gentleman, in the strict sense of

the word, will, it seems, justify a captain of a ship in excluding a passenger from the cuddy table, whom he has engaged by contract to provide for there; but it is difficult to say in what degree want of polish would, in point of law, warrant such exclusion; but it is clear that if a passenger use threats of personal violence towards the captain, the captain may exclude him from the table, and require him to take his meals in his own private apartment. *Prendergast v. Compton*, 8 C. & P. 454. (Tried before Tindal, Ch. J., 21st Dec. 1837.)

The Admiralty entertains jurisdiction of personal torts committed by the master on a passenger. In the case of *The Ruckers*, a civil suit for damages was brought in the Admiralty, for an assault by the master of the ship on a passage on the high seas, and on full consideration the jurisdiction was sustained. Lord Stowell said, "Looking to the locality of the injury, that it was done on the high seas, it seems to be fit matter for redress in this Court." 4 Chr. Robinson's Rep. 73.

THE TORONTO.

Monday, 4th June, 1838.

SILLERY—HUNTER.

SILLERY.

Compensation decreed to seamen out of the proceeds of the materials saved from the wreck by their exertions.

Per Curiam.

This is a claim by the seamen of the ship Sillery, for salvage out of the materials saved by their exertions from the ship, after she had been wrecked at Duck Island, off Cape Ray, on or about the 1st of May last, on her voyage from Liverpool to this port in ballast. The seamen were employed eight days in removing the materials from the wreck to the brig Pomona, which conveyed them to Quebec. They having received in advance their wages up to the time of the loss of the ship, the only question is as to the remuneration to which they may be entitled in saving the materials. For their services, which extended over a period of eight days, I conceive that they are entitled to be paid at the rate of five shillings, and accordingly decree forty shillings to each of them.

Maguire, for promoters.

Gairdner, contra.

Saturday, 16th June, 1838.

FACTOR—PRICE.

The detention of a vessel during the winter by stranding in the River St. Lawrence on her voyage to Quebec, where she arrived in the succeeding spring, does not defeat the claim of the seamen to wages during the detention.

FACTOR.

JUDGMENT.—*Hon. Henry Black.*

The promoter shipped as a mariner on board the schooner Factor, on the 26th January, 1837, on a voyage from the port of London to the port or place called Coast Castle, in Africa, thence to the Island of Madeira, and thence back to the port of London at the rate of wages of 17. 5s. per month. The schooner accordingly proceeded from London to Coast Castle and thence to the Island of Madeira, where her cargo was discharged and another taken in; with the cargo thus taken in at Madeira, instead of returning to the port of London she proceeded on a voyage to this port. On her way up the St. Lawrence, in the month of November last, she took the ground at Millevaches, about 150 miles below Quebec; and being situate in the tide-way, and immoveable, was there exposed to the full force of the drift-ice, which was then beginning to form in great masses. It being the opinion of the master and crew that the schooner was in imminent peril of being carried away and destroyed by the ice, they removed to Green Island, where they passed the winter. In the course of the winter the promoter was sent by the master to Quebec, and put into the Marine Hospital to be treated for a wound or sore occasioned by his being frostbitten whilst in the service of the schooner. Contrary to the expectations of the master and crew the

FACTOR.

schooner passed the winter at the place where she took ground, and in the following spring was floated and brought up to Quebec, by the master and the remainder of the crew. The present suit is brought for the recovery of wages by the promoter for the whole period of time from his shipping in London down to the time of her arrival at Quebec, thus including the time that the schooner was detained in the ice at Millevaches. On the part of the defendant it was argued by Mr. Duval, that the voyage being defeated by a *vis major*, the seamen lost their wages. Now, apart from the effect of the deviation by the master in proceeding from Madeira to Quebec, instead of returning to London, we have here the case of a temporary interruption of a voyage by a peril of the sea, which cannot affect the title of the seamen to their wages. This subject underwent much discussion in the case of the crews of the British ships detained in Russia, under the orders of the Russian Government in the year 1800. In one of the cases arising out of this detention, which was tried before Lord Alvanley, chief justice of the Common Pleas, a special verdict was taken, and the Judges being equally divided in opinion, one of the Judges consented to a judgment in favour of the defendant to enable the plaintiff to bring his writ in error (*a*). This judgment was subsequently reversed in the King's Bench (*b*); and the judgment of reversal of the King's Bench was affirmed in the House of Lords (*c*), thus definitively settling the question. In a previous case of *Hadley v. Clarke* (*d*), Lord Kenyon says, "a temporary interruption of a voyage by an embargo does not put an end to such a contract as this. If this contract were put an end to, it might equally be said that interruptions to a voyage from other causes would also have put an end to it, *e. g.*, a ship being driven

(*a*) *Beale v. Thompson*, 3 B. & P. 405 (23rd May, 1803).

(*b*) 4 East, 546 (8th Feb. 1804).

(*c*) 1 Dow. 299 (9th June, 1813).

(*d*) 8 Term Rep. 266.

FACTOR.

out of her course; and yet that was never pretended. Instances of such interruptions frequently occur in voyages from the north-west parts of this kingdom to Ireland; sometimes ships are driven by the violence of the winds to the ports in Denmark, where they have been obliged to winter." In another case, *Beystrom v. Mills* (e), Lord Eldon says, "There is no doubt that if a ship does not perform her voyage, the sailors have no title to wages; the policy of the law has said so, as the means of making it the interest of the sailors to preserve the ship; but it is equally certain, that if the voyage is performed, a temporary interruption shall not defeat the claims of the seamen." These cases sufficiently establish the general principle, and its application to cases much less favourable to the claim of the seamen than the present one; indeed, Lord Brougham, arguing as counsel for the seamen in the case of the Russian embargo, before the House of Lords, puts the very case now before the Court as one where the claim of a seaman was undoubted, and upon this point he is not contradicted. "The vessel," he says, "might be detained for weeks and months by stress of weather, as in the case of a ship frozen up, and the mariners taken out and removed to a distance of some miles, and yet the claim for wages would be good" (f). Upon the whole I entertain no doubt that the law in this case is with the promoter, and I accordingly decree to him his wages from the time of his shipping himself in London, down to the time of the arrival of the schooner in the port of Quebec, being the whole sum demanded.

Maguire, for the promoter.

Duval, Q. C., contra.

(e) 3 *Espinasse's*, N. P. C. 37.

(f) 1 *Dow*. 309.

Wednesday, 20th June, 1838.

GENERAL HEWITT—SELLERS.

GENERAL
HEWITT.

Imprisonment of a seaman by a stranger for assault, does not entitle him to recover wages during the voyage and before its termination.

Per Curiam.

The libel in this cause states that the promoters entered into the service of the ship on or about the 31st of March last, as seamen on a voyage from the port of London to this port of Quebec, and back to the port of London. Pending the voyage they enter into an affray at Quebec, and are arrested and confined in the common gaol, at the instance of the person with whom this affray took place; and during their confinement they institute a suit for their wages accrued at the time of their imprisonment, which they conceive they are entitled to as being unable to proceed on the voyage.

This is not the case of a seaman prevented from fulfilling his engagement by any act of the masters or owners, or by sickness or other *vis major*. The impediment to the fulfilment of the engagement arises from the act of a stranger,—proceeding possibly from the fault of the promoters themselves, but at all events the act of a stranger,—which cannot discharge them from their engagement to the ship (*a*). If this act be a tortious act, their remedy is by action against the stranger, but they can derive no right from it as against the ship.

Bradley, for promoters.

McCord, contra.

(*a*) Comyn's Digest. Tit. Con- 6 Toullier, L. 3, T. 3, c. 4, s. 609,
dition (L. 14); 1 Rol. 452, l. 40; p. 646, in note.

Saturday, 11th August, 1838.

MARY AND DOROTHY—TEASDALE.

Possession of a ship awarded to the master appointed by the owner, to the exclusion of the master named by the shippers of the cargo.

MARY AND
DOROTHY.

This was a cause of possession, civil and maritime, promoted by the owner of the ship Mary & Dorothy, to recover possession thereof, under the circumstances mentioned in the following judgment of the Court :

JUDGMENT.—*Hon. Henry Black.*

This is the case of an attachment of a ship in a cause of possession. The ship in question was chartered in England from the owner, with a master and crew provided by him, to proceed to this port and receive a cargo here, to be conveyed to England. Some differences arose between the master, William Teasdale, and the shippers of the cargo, under the charter party, arising from the intemperate habits of the master; and the shippers here obtained from him an authority in writing, to the effect that if he should again get drunk, it would be competent to them to remove him, and to put another master in his place. The master having in point of fact broken this condition, the shippers dispossessed him of the command of the ship, putting another master in his place; and the present application is in the name of the owner, for restoration of the ship to the master who had been so displaced.

Of the jurisdiction of the Court in matters of this kind,

MARY AND
DOROTHY.

there can be no doubt (a). The only question then is as to the effect of the above agreement between the master and the shippers; and in my judgment it is wholly inoperative. The shippers of the cargo have no control over the ship, or its navigation, unless when expressly given to them by the owner. The owner, who is answerable to the shippers for the proper navigation of the ship, exercises his own judgment in selecting or removing the master. The shippers are strangers to the contract between the owner and the master, and cannot, in any way by their acts, alter or affect the rights and obligations of these parties, without an express authority to that effect from the owner. The master, for all the purposes of the present application, is the agent or *prepositus* of the owner, and has rightly used his name in the proceedings which have been instituted. It may be that the owner, if he were here, would be justified in removing the master, by reason of his intemperance; and indeed that it would be highly imprudent in the owner to allow him to retain the command of the ship; but this does not warrant his removal by any other person, without the authority of the owner. The master might possess qualities more than compensating—in the judgment of the owner—irregularities in port, of the kind imputed to him; but of all this, I repeat, the owner is the sole judge. If the Court were to reject the present application, it must be upon one of two grounds; either upon the ground of the above agreement between the master and the shippers, or, upon the ground of unfitness in the master for the discharge of his duties as master. The

(a) *The Warrior*, 2 Dod. 288; *The Guardian*, 3 Rob. 93; *The Aurora*, 3 Rob. 133; *The New Draper*, 4 Rob. 287; *The Sisters*, 3 Rob. 275, and 5 Rob. 155; *The Peggy*, 4 Rob. 304; *The Partridge*, 1 Hag. 81; *Exparte* *Blanchard*, 2 Barn. & Cres. 244; *The Pitt*, 1 Hag. 240; *The Apollo*, ib. 306; *The John of London*, ib. 342; *The Fanny and Elmira*, Edw. 117; *The Lagan*, 3 Hagg. 418; 3 & 4 Vict. c. 65, s. 4.

former ground has already been disposed of, and as to the latter, I know of no authority in the Court to substitute its judgment—upon the fitness of the master, and upon his continuance in the office of master—for the judgment of the owner, who has put his property into the care of the master, and is answerable for his acts and defaults. I shall accordingly decree possession of the ship to the owner or his legal agent, whom I understand, the master named by the owner to be in relation to this ship (b).

MARY AND
DOROTHY.

Aylwin and Bradley, for the owner.

McCord, contra.

(b) Courts exercising Admiralty jurisdiction, have had further power given to them in such matters, by "The Merchant Shipping Act, 1854," which contains the following enactment:—
"Any Court having admiralty jurisdiction in any of Her Majesty's dominions may, upon application by the owner of any ship being within the jurisdiction of such Court, or by the part owner or consignee, or by the agent of the owner, or by any certificated mate, or by one third or more of the crew of such ship, and upon proof on oath to the

satisfaction of such Court that the removal of the master of such ship is necessary, remove him accordingly; and may also, with the consent of the owner or his agent, or the consignee of the ship, or if there is no owner or agent of the owner or consignee of the ship within the jurisdiction of the Court, then without such consent, appoint a new master in his stead; and may also make such order, and may require such security in respect of costs in the matter, as it thinks fit."
(17 & 18 Vict. c. 104, s. 240.)

Saturday, 25th August, 1838.

LORD JOHN RUSSELL—YOUNG.

LORD JOHN
RUSSELL.

1. In case of collision arising from negligence or unskillfulness in management of ship doing the injury, pilot having the control of the ship is not a competent witness for such ship without a release; although the master is.

2. Ship held liable for collision, notwithstanding there being a pilot on board.

3. Damages awarded in case of collision in the harbour of Quebec.

The libel alleged that on or about the 27th of May last, the ship or vessel, the Robert Kerr, James Gourley, master, of the burthen by admeasurement of 360 tons or thereabouts, navigated by a crew consisting of fifteen persons besides the master, arrived at the port of Quebec with a cargo of salt, and came too, with one anchor, off the city of Quebec in the port of Quebec. That at about five o'clock in the afternoon of the same day, she let go the larboard anchor and twenty-five fathoms of chain or thereabouts, and was thus moored by both her anchors. That about nine o'clock in the evening of the same day, —the weather being then bright and clear, and the wind blowing fresh from the east,—the barque the Lord John Russell, of St. John, New Brunswick, John Young, master, was driving towards the said Robert Kerr, when John Acheson, the carpenter of the Robert Kerr, then on watch, called to the persons on board of the Lord John Russell, upon her coming within hail, and received no answer; and just about the same time the anchor of the Robert Kerr was let go right in front, in the hawse of the said Robert Kerr; and immediately the Lord John Russell struck the Robert Kerr, and went right on board of her, the Robert Kerr then being at anchor to the leeward of

the Lord John Russell. That, notwithstanding that the crew of the Robert Kerr used their utmost exertions to separate the vessels, and veered out the cables and dropped clear of the Lord John Russell, the Lord John Russell immediately fell on the larboard side of the Robert Kerr, and was held on by the said Robert Kerr until the Lord John Russell hove up her anchor to see if the Lord John Russell could get clear; but that the Lord John Russell, after remaining there for some time, again let go her anchor, which caught one of the anchors or chains of the Robert Kerr, and caused both ships to drive and continue to do so until they got past the barque Baltic Merchant and brig Forrester. The collision, it was alleged in the libel, occurred wholly through the inattention and want of skill of the persons on board the Lord John Russell, and not from any inattention or want of skill of the persons on board of the Robert Kerr. The libellant, in conclusion, specified the injuries done, and stated the damages at 500%.

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The responsive allegation given in by the owner of the Lord John Russell pleaded that the Lord John Russell being in ballast, bound to this port, rounded Point Levi, on the 27th of May last at about half-past nine at night, under a stiff breeze from the north-eastward; that all sail was then taken in and close hauled with clue line, bunt lines, and reef tackles, as is usual when ships are coming to anchor; and that in about half an hour the pilot Guillaume Lebel, ordered the anchor to be let go, which was accordingly done, and forty-five fathoms of chain run out. That the port of Quebec was then crowded with vessels, and the weather rather dark; and that none of the vessels there, and more particularly the Robert Kerr, showed lights of any kind, as required by the regulations of the port. That the Lord John Russell dragged her anchor some distance, and was at last brought up in the hawse of the Robert Kerr; that the boat of the Lord John

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Russell, then hanging at her stern, was crushed by the bob stay of the Robert Kerr; and that the pilot of the Lord John Russell, to prevent further mischief, cried out to the people on board of the Robert Kerr, to let out more chain; to which the master of the Robert Kerr gave a rude refusal; that the Robert Kerr did not hail the Lord John Russell first, but that, after abusing the pilot for some time, the Robert Kerr let out about five fathoms of chain, so as to leave the boat of the Lord John Russell clear; that the pilot of the Lord John Russell then called upon the people of the Robert Kerr to let out more chain, as it was then high tide, and as at the ebb the two vessels must otherwise come in collision; that the people on board the Robert Kerr then announced that they would not let out any more chain; and that the Robert Kerr might have let out, with perfect safety, twenty fathoms of chain, and in that case the collision would have been prevented; that upon the refusal of the master of the Robert Kerr to let out more chain some minutes were given him to pull down, as he was very violent and angry; and that after this the master of the Lord John Russell hailed him again, and asked him to concert measures to avoid coming into collision at the turn of the tide; upon which the master of the Robert Kerr suggested that the people of the Lord John Russell should take up their anchor, and that he would give them a warp in the meantime, so that upon the jumping of the two vessels by the turn of the tide they might swing clear; that accordingly when the two ships swung with the tide, the Lord John Russell being in the weather side, rather astern of the Robert Kerr, with the bow just about the fore rigging of the Robert Kerr,—the anchor of the Lord John Russell being up, and the vessel secured to the Robert Kerr by a warp,—efforts were made by the crew of the Lord John Russell to sheer, but to no avail; the wind increasing much, and the vessel being too much abeam, she would

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not sheer: that the ebb tide, by this time, having made out strong, and the Robert Kerr being loaded and heavy, and being in advance of the Lord John Russell, both vessels drove right to windward; and while driving the master of the Robert Kerr became for the first time a little alarmed, and desired the master of the Lord John Russell to let go his anchor again, in order to prevent driving further, which was immediately complied with, and seventy fathoms of chain veered out; that this anchor being insufficient to stop the progress of the two vessels, the master of the Robert Kerr desired the master of the Lord John Russell to let go a second anchor, which was done with sixty fathoms of chain, but to no purpose,—as the ship still drove in an unmanageable position,—until they drove upon the brig Forester, by which the jib-boom of the Robert Kerr was carried away; the two vessels then drove onwards until brought up by the barque Baltic Merchant: that being then unmanageable, and the wind being high, they received much damage in their hulls, spars, and rigging, by damage-collision one whole tide: that it was fully in the power of the master of the Robert Kerr to have let out more chain when first desired to do so, and that if he had done so, all damage and loss to the said vessel would have been avoided, inasmuch as though at that time the boat hanging at the stern of the Lord John Russell had been injured, no injury whatever had been done to the Robert Kerr; and that at the same tide, and nearly at the same place, the ship Ocean was driven by stress of weather from her moorings and sent ashore in the river St. Charles.

From the evidence it appeared that in the afternoon and evening of the 27th of May last, the Robert Kerr was moored with two anchors, opposite the India wharf in the harbour of Quebec, and that the Lord John Russell coming into the harbour from sea, with a flood tide and a fresh wind from the eastward,—the night being sufficiently

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light and clear to admit of a ship being seen at a considerable distance,—let go her anchor at about half-past nine in the evening or night, in the hawse of the Robert Kerr, and thereby gave her a foul berth. This fact was established by many of the witnesses in the cause, and contradicted by none; and to it was to be attributed the collision, and subsequent damage to the Robert Kerr. The occurrences which afterwards took place were substantially as set forth in the libel.

JUDGMENT.—*Hon. Henry Black.*

1. A preliminary question has been raised as to the competency of the master of the Lord John Russell and of the pilot of that ship, as witnesses for the defence. It appears to me that the master was a competent witness, but that the pilot was not, without a release from the owner (a). The pilot was substituted in the place of the master in the navigation of the ship, and the master ceased therefore to be liable as such; the whole of the liability for default, negligence, or unskilfulness came to rest upon the pilot. Roccus says, "*Navis etiam habet pilotum, qui est ille, qui navem regit in navigando, et plenam scientiam, et notitiam artis navigandi habere tenetur. Eligitur vero pilotus a magistro navis, et obligatur ad omne damnum, quod contigerit ex ejus culpa, imperitia aut negligentia in regendo navem, et obligatus est, etiam de levissima culpa non exercendo exactissimam diligentiam*" (b). To allow the pilot, having the control of the navigation of the ship, with the consequent obligations, to be examined as a witness for the ship whereof he was pilot, would be to make him a witness in his own cause, and for this reason he has been considered as an incompetent witness (c). Whilst the

(a) As to the practice of examining witnesses under a release, see 5 Rob. 343, in note; 2 Hagg. 149, in note.

(b) De navibus et Naulo, Not.

ix., Num. 20, 21, 22.

(c) *Martin v. Henriksen*, L. Raym. 1007, and Salk. 287; *Hawkins v. Finlayson*, 3 Car. & Pay. 319.

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master exercises the control of the navigation of the ship, and before delegating his authority to the pilot, as the liability is with him, so also is he an incompetent witness (*d*). It does not appear in this case that he divested the pilot of his control over the ship, and I think therefore that the master is a competent witness. The question having been raised at the bar, the Court felt itself called upon to determine it, although the material facts in the case are established by evidence apart from the testimony of these witnesses.

2. It has been argued that the Lord John Russell, being under the management of a pilot on board, the owner was discharged from all responsibility arising from the collision, but the law is otherwise. This question came under the consideration of the Court in the case of the *Cumberland* (*e*), and in that case the Court held that the ship was liable for a collision arising from her being unskilfully or negligently navigated, although under the control of a regular pilot on board. I have seen no reason to doubt the correctness of the conclusion which the Court then came to. Under the general maritime law, the power of the master, as to the navigation of the vessel, being suspended while the pilot is in charge of the vessel, his personal liability for the management of the ship necessarily ceases; but it by no means follows therefrom that the ship itself and her owners shall not be answerable for damage done by her in consequence of the fault of those having the charge of her, whoever they may be. In examining the question here, it must be looked at without reference to the English Pilot Act (*f*), and we must seek for decisions and authorities as to the liability

(*d*) *Bird v. Thompson*, 1 Esp. N. P. C. 339; *Cuthbert v. Gostling*, 3 Camp. 515; *Green v. The New River Company*, 4 Term. Rep. 589; *Miller v. Falconer*, 1

Camp. 251; *Bowcher v. Noidstrom*, 1 Taunt. 568.

(*e*) 8th November, 1836.

(*f*) 6 Geo. 4, c. 125.

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of the offending ship, unconnected with this Act, which relieves owners from the obligation to which, as owners, they are by the common maritime law liable. The general law upon this subject is stated by Lord *Stowell*, in the case of the *Neptune the Second* (*g*), the authority of which remains unimpeached:—"It is acknowledged in this case that the damage was done by the ship proceeded against; but it has been set up, in the way of excuse, that she was at the time under the care of a regular pilot, and was acting in obedience to his directions; and it has been contended in the argument that the pilot alone is answerable for any damage that may have been sustained in consequence of the mismanagement of the vessel. If the position could be maintained that the mere fact of having a pilot on board, and acting in obedience to his directions, would discharge the owners from responsibility, I am of opinion that they would stand excused in the present case; for I think it is sufficiently established in proof, that the master acted throughout in conformity to the directions of the pilot. But this, I conceive, is not the true rule of law. The parties who suffer are entitled to have their remedy against the vessel that occasioned the damage, and are not under the necessity of looking to the pilot, from whom redress is not always to be had for compensation. The owners are responsible to the injured party for the acts of the pilot, and they must be left to recover the amount as well as they can against him. It cannot be maintained that the circumstance of having a pilot on board, and acting in conformity to his directions, can operate as a discharge of the responsibility of the owners." In questions of this nature we may also refer to the decisions of foreign courts as authorities. In 1806, it was decided by the Supreme Court of Pennsylvania (*h*), that

(*g*) 1 Dodson's Rep. 467.

(*h*) *Busby v. Donaldson*, 4 Dallas, 206.

the owner of a ship doing damage to another is liable, though the ship was in charge of her pilot. The principle appears to be that the pilot is substituted in the place of the master, and the master ceases therefore to be liable as master, but the owners remain answerable for the conduct of the new temporary master,—the pilot,—in the same way, and to the same extent, that they were answerable for the conduct of the master himself, so far as the navigation of the ship is concerned. Chancellor *Kent*, to whom the science of the law is so much indebted, recognises, in his Commentaries on American law, the principle so clearly laid down by Lord *Stowell*. "It may be here observed," says Chancellor *Kent*, "that it is the duty of the master engaged in a foreign trade, to put his ship under the charge of a pilot, both in his outward and homeward voyage, when he is within the usual limits of the pilot's employment. The pilot when on board has the exclusive control of the ship. He is considered as master *pro hac vice*, and if any loss or injury be sustained in the navigation of the vessel while under the charge of the pilot, through his default, negligence, or unskilfulness, the owner would be responsible to the party injured for the act of the pilot, as being the act of his agent. Some doubt has been thrown on the point by a dictum of Ch. J. *Mansfield* in *Bowcher v. Noidstrom* (i), but the weight of authority, and the better reason is, that the master in such a case, would not be responsible as master, though on board, provided the crew acted in regular obedience to the pilot" (k). Mr. Justice *Story*, who has enriched the maritime jurisprudence of the United States with so many valuable decisions, admits, in his edition of Lord *Tenterden's* work on shipping, the authority of the two foregoing cases (l), and Mr. Bell, whose work on commercial law occupies so high a place, says:—

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(i) 1 Taunt. Rep. 568.

(k) 3 Kent's Com. 135.

(l) Abbott on Shipping, p. 210,
in note.

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"In cases of collision, it is no defence to the owners that the ship in fault is under the direction of the pilot, and that the remedy lies against him. They are liable, in the first place, and must seek their remedy against the pilot" (*m*). These authorities are further confirmed by the decision of Sir John *Nicholl*, in the case of the *Girolamo*, in the year 1835 (*n*).

3. But, it has been set up on the part of the Lord John Russell, that the injury suffered by the *Robert Kerr* arose from the fault of the people on board of that vessel, after the Lord John Russell had come to anchor. There does not appear to me to be any ground for this charge against them. When one ship is at anchor it augurs great want of skill and attention in a harbour like that of Quebec, for a ship under sail to be so brought-to as to run foul of her (*o*). Besides the injury is proved beyond a doubt to have arisen from the unskilful manner in which the Lord John Russell was brought to anchor, and without any fault on the part of the *Robert Kerr*. There has been evidence offered to show that the damage suffered by the *Robert Kerr* amounted to £508 14s. 6½*d.* currency, and that this sum was actually paid for her repairs; I shall, however, give an interlocutory decree for the damage, referring the amount to the Registrar and merchants to report thereon.

At a subsequent day the Registrar, having taken to his assistance Thomas Froste, and William Stevenson, Esqrs. reported the damage to be £404 9s. 4*d.* currency, and this report was confirmed.

Duval, Q. C., and *Anderson*, for the *Robert Kerr*.
Aylwin, contra.

(*m*) 1 Bell's Com. 583.

(*o*) Consolato del Mare, cap.

(*n*) Nautical Mag. for Dec., 1835, No. 46, vol. iv. p. 797, and of the *Girolamo*, 3 Hagg. 173.
3 Hagg. 169.

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NOTE.—In April, 1853, on appeal to the Circuit Court of the United States for the third circuit, in the case of *The Creole*, a British ship bound out, and in charge of a licensed pilot, the Court reversing the judgment of the District Court, held that the owner was not released from responsibility, in a case of collision, from the circumstance of having a pilot on board. Mr. Justice *Grier*, in delivering the opinion of the Court in that case, thus stated what is the American maritime law upon the subject:—

The position assumed on behalf of the ship, and by which it is sought to cast the responsibility on the immediate cause of it,—the pilot,—raises a question of vast importance in its bearing on our bay and river navigation. In most, if not all the ports of the United States, the laws for licensing and regulating pilots are enacted by the different States in which the ports are situated: and however variant they may be in their details, they generally require a vessel entering or leaving a port, to employ a licensed pilot. The persons licensed are seldom of sufficient property to respond to damages for their acts of negligence, nor are they required to give security to a sufficient amount to meet such responsibility. If the colliding vessel be discharged from liability, while under the direction of a licensed pilot, and recourse for the injury can be had against the pilot alone, the injured party will, in most cases, be wholly without remedy.

It is a violent presumption against the validity of this defence, that in the numerous cases of collision daily occurring in the United States, in many or most of which, no doubt, the vessels have been under the control of licensed pilots, the owners have not endeavoured to avail themselves of it. Nor has the learned counsel for the respondent, with all his research, brought to my notice a single case in the common law or admiralty courts of the United States, where the defence has been held available.

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On the contrary, in the case of *Bussy v. Donaldson* (*p*), in the Supreme Court of Pennsylvania, when this was set up, it was not sustained, and Chief Justice *Shippen*, speaking in 1800, of the pilot law of Pennsylvania,—an earlier law than the one now in force, but in this particular section the same as the present one,—says, “The legislative regulations were not intended to alter or obliterate the principles of law, by which the owner of a vessel was previously responsible for the conduct of a pilot; but to secure, in favour of every person (strangers as well as residents) trading to our ports, a class of experienced, skilful, and honest mariners, to navigate their vessels safe up the bay and river Delaware. The mere right of choice, indeed, is one, but not the only, reason why the law in general makes the master liable for the acts of his servant: and in many cases where the responsibility is allowed to exist, the servant may not in fact be the choice of the master. For instance, if the captain of a merchant vessel dies on the voyage, the mate becomes captain, and the owner is liable for his acts, though the owner did not hire him originally, or choose him to succeed the captain. The reason is plain; he is in the actual service of the owner, placed there, as it were, by the act of God. And so in the case under consideration, the pilot was in the actual service of the owner of the ship, though placed in that service by the previous act of the legislature.

The doctrine that the owners are not liable for a collision by their vessel when under the control of a licensed pilot, was first introduced in England by the Pilot Act of 52 Geo. 3, c. 39, passed in 1812. Previous pilot laws, although they required every vessel to take on board such a pilot under penalties, did not discharge the owners from liability for their negligence. It appears by the case of *Bowcher v. Noidstrom* (*q*), which was decided

(*p*) 4 Dallas, 206.

(*q*) 1 Taunton, 568.

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before Chief Justice *Mansfield* in 1809, that this notion that a licensed pilot was not considered a servant or agent of the owner, had obtained no place in courts of justice; for the Chief Justice held the *master* liable, on the assumption that he represented the ship or owners; and the case was reversed, not because his legal position was incorrect, to wit, that the ship or owners would have been liable for the act of either master or pilot, as their servant; but because one servant was not liable for the act of another, who was not his subordinate. The case of *Fletcher v. Braddick* (*r*), though not directly in point, seems not to recognise the same principle. In cases of collision, the injured party has a remedy by action at common law, not only against the owners, but the master. And although the master of the vessel is the servant of the owners, and they are liable for his acts in the course of his employment, he is an exception to the general rule, that the remedy of third persons for the servant's acts of negligence is only against the master. As the pilot, when on board, has the absolute and exclusive control of the ship, the *master* might well defend himself against liability for the acts of one over whom he has no control or authority. Therefore by the maritime law the *master* is not held liable for the acts of mariners, who are not of his own choosing, and who are not acting under his orders (*s*). The pilot is for the time master of the vessel, and substituted in the place of the captain, with the same duties and responsibilities. But it is far from being so clear as a principle, either of maritime or common law, that the *vessel* or the *owners* are discharged from responsibility for the same reason.

Pilot laws are intended not to burthen commerce, but for its benefit and safety. As a general rule, masters of vessels are not expected to be, and cannot be, acquainted with the rocks and shoals on every coast, nor able to

(*r*) 5 Bos. & Pul. 182.(*s*) Molloy, B. 2, c. 3, sec. 12.

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conduct a vessel safely into every port. Nor can the absent owners, or their agent, the master, be supposed capable of judging of the capacity of persons offering to serve as pilots. They need a servant but are not in a situation to test or judge of his qualifications, and have not therefore the information necessary to choice. The pilot laws kindly interfere, and do that for the owners which they could not do for themselves. It selects persons of skill and experience, and requires them to give bonds for the faithful performance of their duties; and if it should happen in some particular cases, that owners may not need the services of such pilot selected by law, it is but just that they should contribute to the support of a system instituted for their benefit. This compulsion which is supposed to annul the relation of master and servant between pilot and owners, is more imaginary than real. It has its origin rather in minute verbal criticism of the language of the pilot laws, than on fact. The Pennsylvania pilot law, it is true "obliges" a pilot to be taken on board, under the penalty of paying half pilotage. But, as has often been said, there is no magic in words; for, after all, it amounts only to this, that vessels which do not find it necessary to avail themselves of the services of pilots provided for them by the law, may be piloted by the master or other person, if they prefer it; but in such case they will be required to pay a small tax, equal to half pilotage, for the benefit of the wives and children of those whose lives are daily exposed to peril and hardship, for the purpose of tendering their services, if needed. The assessment of a tax for the support of a system so beneficial to ship owners, where the services are declined, is no compulsion, and calling it a penalty will not alter the case. The vessel when under the control of a pilot, is in the legal possession of the owners. The pilot is their servant, acting in their employ, and receiving wages for services rendered to them. The fact that he was

selected for them by persons more capable of judging of his qualifications, cannot alter the relation which he bears to the owners. He is still their servant.

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The Court of Exchequer in the case of *The Attorney-General v. Case* (*l*), confirm what I have said, that before the Pilot Act of 52 Geo. 3. (1812), the owner was held liable for the act of the pilot as his servant. They decided also, that the Liverpool Pilot Act was not compulsory or penal, though it required the vessel to pay the pilot's wages, whether it employed him or not. In the case before us the master may decline the services of the pilot, by paying half his wages. I am well aware that Dr. Lushington, in the case of the *Maria* (*u*), which arose on the Newcastle Pilot Act, has given a different construction to the Liverpool Pilot Act, because it uses the words "*oblige and require*."

The English cases on the subject since 1812 cannot be reconciled with one another, and have not been adopted as precedents here. On the contrary the case of *Bussy v. Donaldson*, from which I have quoted the opinion given by Chief Justice *Shippen*, has been adopted as founded on the sounder reasoning (*x*). And in 1847, quite independently of that precedent, and without the least reference to it, the Supreme Court of Pennsylvania again interprets the statute before us in the same way as he did the one before him, in this respect, exactly like it (*y*).

They say, "The legislature have wisely decided not to *compel* the owners to employ a licensed pilot, but have permitted them, if they please, to compound by paying half pilotage, for the benevolent and beneficial purpose of relieving distressed and decayed pilots, their wives and

(*l*) 3 Price, 302.

175-6.

(*u*) 1 W. Robinson, 95.

(*y*) *Flanigan v. The Washington Insurance Company*, 7 Barr.

(*x*) *Yates v. Brown*, 8 Pickering, 23; *Williamson v. Price*, 16 Martin, 399; 3 Kent's Com.,

31.

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children. This Act sets out an inducement to avail themselves of their services, but does not compel them to do so. This construction of the Act is reasonable and just."

Thus far I have considered the question on the principles peculiar to the *common or civil law* relating to master and servant, rather than those of the maritime law. The proceeding in this case is *in rem*, for a maritime tort. The rights and remedies of the libellants are to be tested by the principles of that law, unaffected by any statutory provision. A proceeding *in rem* in Admiralty is not a mere attachment to compel the appearance of the owners, as in civil law proceedings, and attachments under the custom of London, which are not proceedings *in rem*, in the Admiralty sense of the phrase. The Court of Admiralty proceeds on the principle that the vessel itself is hypothecated by the contracts, as well as the obligations arising *ex delicto* of the master, and is herself liable for all maritime liens. The owners and others interested, are allowed to intervene *pro interesse suo*; and for convenience of trade and commerce, are *permitted* to release the vessel, by substituting their stipulation and security in its place. But the property attached is, in all cases, treated as the debtor, and primarily liable.

By the maritime law, the power of the master to bind the owners by his obligations *ex delicto*, did not extend beyond the tacit hypothecation of the property in his possession. By surrendering the hypothecated vessel, the owners escape further liability, or if they intervene, cannot be made liable beyond her value.

These principles which prescribe the powers of the master of a vessel, are not drawn from the doctrine of the civil law concerning the relation of master and servant, but had their origin in the maritime usages of the middle ages. By these the ship was bound to the merchandise, and the merchandise to the ship; and both are bound for the mariners' wages, "even to the last nail of the ship."

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By these the master was authorised to bind the vessel by bottomry. And by these the vessel becomes hypothecated for the obligations of the master arising *ex delicto*, and is herself treated as the debtor or offender. Hence, also, the vessel becomes bound to those who dealt with the master, whether he was appointed to act as their agent, or the ship was let to him on charter party. It is unnecessary to make an array of the various European writers on this subject, as authority for these statements: I refer for them to the opinion of Judge *Ware*, in the cases of the *Spartan*, the *Rebecca*, and the *Phœbe* (z), in which the origin and principles of maritime law affecting the liability of vessels for contracts of the master are treated with the ability and research which distinguished that Judge.

It would seem to follow from these principles, that third persons who may be supposed to be ignorant of the owners, have a right to treat the vessel as primarily liable, *ex delicto*, for the acts of the owner, who has the legal possession and control of her movements. The pilot is master for the time being—as such, also, he is legally in possession, acting for the owners, and in their service. The law which hypothecates the vessel for negligent or wrongful acts of her commander, does not stop to inquire as to the mode of his appointment, or the motives or degree of consent which accompanied it.

It is in accordance with these principles that the case of the *Neptune the Second* (a) was decided by Sir William *Scott*, in 1814, two years after the passage of the Pilot Act of 52 Geo. 3, already referred to. It is supposed by Dr. *Lushington* (b), that the learned Judge overlooked the provisions of that statute; but as a true statement of the maritime law unaffected by statute regulations, it has

(z) *Ware*, 138, 188, 263, &c.

(b) 1 *W. Robinson*, 49.

(a) 1 *Dodson*, 467.

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never been impugned. In that case the pilot was wholly in fault, and it was objected that the vessel and the owners were not liable for the damages occasioned by the collision. But Sir William *Scott* asserted the law to be "that the parties who suffer are entitled to have *their remedy against the vessel that occasioned the damage*, and are not under the necessity of looking to the pilot for compensation. It cannot be maintained that the circumstance of having a pilot on board and acting in conformity with his directions, can operate as a discharge of the responsibility of the owners."

I am authorised to say that the point of law now before us, has been decided by my brother *Wayne*, in the district of South Carolina, in the same way as I now determine it.

Thursday, 20th September, 1838.

DELTA—MURRAY.

Attachment decreed for contempt in obstructing the marshal, in the execution of the process of the Court.

DELTA.

Per Curiam.

In this case it is stated in the affidavits that the master of the brig Delta had obstructed the marshal in the execution of the process of the Court, and had weighed anchor after the vessel had been regularly attached in this cause, with the intention of proceeding to sea, and was only prevented from doing so by a naval force acting under the authority of the marshal of the Court. The Court decreed a monition to show cause why an attachment should not issue for a contempt (a). This monition having been regularly served, and the master not showing any cause, it remains only to order the attachment to issue (b).

Maguire, for the promoter.

Gairdner, for the master.

(a) 1 Rob. Ad. R. p. 331

(b) When a vessel under arrest for bail to the amount of a part owner's interest, and after commission to take bail, at the instance of the master—the other part owner—had issued, was removed by the master and others,

to Jersey, the High Court of Admiralty decreed an attachment against the master and mate for their contempt (and they were imprisoned), and a monition against others to show cause. —The Petrel, 3 Haggard, 299.

Monday, 24th September, 1838.

ROMULUS—CALLENDER.

ROMULUS.

The Court of Vice-Admiralty has no jurisdiction in a claim of property to an anchor, &c., found in the river St. Lawrence, in the district of Quebec.

JUDGMENT.—*Hon. Henry Black.*

This is a motion for a warrant to issue out of this Court for an anchor and chain cable, in the possession of one Michel Levesque, and which the parties making the motion, claim as belonging to them. This claim, as stated in the affidavits filed with the motion, proceeds upon the ground that on or about the 13th instant, at a place called the Traverse, about sixty miles below Quebec, in the river St. Lawrence, the anchor and cable in question parted from the ship or vessel called the Romulus, the master having previously to slipping the same caused a buoy to be attached thereto; that on the arrival of the vessel at Quebec, the master dispatched a schooner for the purpose of bringing up the anchor and cable; that in the intermediate time the above Michel Levesque, against whom the process is prayed for, had picked up the anchor and cable, brought the same to Quebec, and was now in possession thereof: and that upon the parties who make the present application, tendering him ten pounds for his expenses, and demanding restitution of the anchor and cable, he had refused to deliver them up.

In this case, then, the controversy between the parties relates to the property or possession of a chattel, which the parties making the motion allege belonged to them, and had been unlawfully taken possession of by the party

against whom it is made, within the body of the district (a). The remedy must be at Common Law: this Court has no jurisdiction over it (b). Motion rejected.

ROMULUS.

Gairdner, for the owners of the *Romulus*.

(a) *Hamilton v. Fraser*, George Okill Stuart's *Lower Canada*, Rep. p. 21, 36, *et seq.*

(b) See Barnes's case, 2 Roll. Rep. 157, cited in 1 East's Rep. 308. On a return to a *habeas*

corpus, it appeared that Barnes was imprisoned by the Court of Admiralty until he should pay 40*l.* or restore an anchor he had taken.

Monday, 5th November, 1838.

AID,—NUTHALL.

AID.

Amendment in the warrant of attachment not allowed for an alleged error not apparent in the acts and proceedings in the suit.

Per Curiam.

In this case an affidavit is made by the promoter setting forth a claim of wages against the brig Aid, William Nuthall master, for services performed on board that ship as a seaman, and a warrant of attachment accordingly issues for attaching her. The marshal returns that he has attached, in virtue of that warrant, a certain ship or vessel called the Eight, William Nuthall master, pointed out to him as the ship or vessel mentioned in the warrant, and therein designated by the name of the Aid. This warrant having issued on the 27th of the last month, having been executed on the 31st, and returned on the 2nd of the present month, a motion is made by Maguire for the promoter to amend the same by substituting therein the name Eight for the name Aid.

Where there is an error apparent on the record and proceedings the Court may amend it on motion of the party. The error to be amended must manifestly appear to be an error by the proceedings themselves, and other things done in the cause (*a*). Where this can be shown, great facilities are allowed in rectifying errors; but as well in the civil law courts as in the common law courts, there must, in cases like the present, be something in the record to amend by (*b*). In the allegation given by

(*a*) Consett's Practice of the 59, s. 5.
Eccles. Courts, Part iii., s. 3, (*b*) Ibid.; and Stevenson v.
p. 81; Oughton's Ordo Jud. Tit. Danvers, 2 B. & P. 109.

Am.

Oughton for such amendment, reference is specially made to the process and proceedings in the cause showing the error. The concluding words in the allegation are—*prout ex processu, et cæteris actis judicialibus, in hac causâ, habitis, ad quæ me refero, liquet et apparet* (c). And Clerke, in treating of amendments, lays down the same rule. In this case there is nothing to justify the substitution of the name Eight in the place of the name Aid in the warrant. The surmise by the party to the officer referred to in his return is of itself no evidence of authority, and is besides directly contrary to the affidavit upon which the writ issued; for, the name of the ship in the warrant corresponds with the name in the affidavit. The party, therefore, can take nothing by his motion. The case of the Thomas Gelston (d) has been cited at the bar in support of the present motion. But in the amendment ordered by the Court in that case, the Court had the admission of the party defendant in the cause that his name was Robert, and that he had been impleaded by the name of John; and, not having appeared under protest, he could not avail himself of this irregularity for the dismissal of the action. Upon examination of the record in that case, it will be found that the amendment ordered by the Court was confined to the giving of conformity to the whole proceedings, by substituting in the place of John and of Robert, the words, "Robert impleaded by the name of John." No practical inconvenience could arise from the allowance of amendments within the limits stated by Oughton and by Clerke; but if the liberty of amendment were carried to the extent here asked for, it would be competent to an individual upon an affidavit of debt against one ship, and a warrant sued out against that ship, to attach any ship he thought proper, and by amending the warrant, upon his mere surmise made to

(c) Ordo Judiciorum, Tit. 59, s. 5. (d) MSS., 12th July, 1837.

AID. the officer, to render the attachment efficacious against such other ship without any affidavit (e), or any warrant against her; a proceeding that it is impossible this Court could lend its aid to.

(e) See Rules and Regulations of the Vice-Admiralty Courts, § 7.

Thursday, 15th November, 1838.

JOSEPHA—McINTYRE.

JOSEPHA.

Suppletory oath ordered in a suit for subtraction of wages.

Per Curiam.

In this case the evidence of the period of service as well as of the particular articles of clothing in the promoter's chests, is not sufficiently precise, and the master of the ship has sailed from this port since the attachment of the ship, without producing or leaving the ship's articles. I shall, under these circumstances, order the suppletory oath to be administered to the promoters (a).

Maguire, for the promoter.

Anderson, contra.

(a) Bro. Civ. & Ad. Law, 385; Quæst. Lib. 1, cap. 43, p. 112;
Heineccius in Pandectas, Part iii., Huber ad Pandectas, Lib. 12,
s. 28; Arn. Vinnius, Select. Jur. Tit. 2, s. 12.

Tuesday, 20th November, 1838.

LADY AYLMER—NADEAU.

Collision between a steam-boat and a bateau, both exclusively LADY AYLMER.
employed in the harbour of Quebec, not cognisable by this Court.

JUDGMENT.—*Hon. Henry Black.*

This is a suit brought against the steam-boat Lady Aylmer, for running foul of a bateau in the harbour of Quebec, wherein the promoter seeks to recover the damages arising from the alleged collision. The owners of the steamboat have appeared under protest, and assigned as reasons for their protest, "that the place where the collision complained of happened, was within the harbour, county, and district of Quebec, and between a bateau, the use of which was limited to the harbour of Quebec, and not used for sea navigation, and a steamboat; and that the steamboat was then used as a tow and ferry-boat, also in the harbour of Quebec; and that such collision not having taken place on the high seas and between ships or vessels navigating or intended to be used in the navigation of the high seas, this Court has no jurisdiction over the matter." The protest is supported by affidavits uncontradicted by the promoter which establish the fact therein set forth.

It cannot be pretended that the jurisdiction which the Court is called upon to exercise in this case is founded upon the locality of the act complained of, inasmuch as that act was committed within the district of Quebec, indeed in the harbour of Quebec (*a*). If then the Court

(*a*) The Friends, 24th June, 1837, MSS.

LADY AYLMER. have jurisdiction, that jurisdiction must be founded upon the maritime nature of the subject-matter of the suit.

Collision between ships is a matter of a maritime nature, but notwithstanding its being of such a nature, the High Court of Admiralty of England has not entertained jurisdiction in cases where the collision took place in ports or harbours within the body of a county (*b*). The Admiralty was ousted of its jurisdiction merely because of the locality where the act was done, notwithstanding the maritime character of that act. The act here complained of does not seem to me to be of a maritime character. In no respect could the bateau, which is alleged to have suffered from the collision, be considered as subject to the jurisdiction of this Court. In certain cases of collision the statute of the Imperial Parliament, 2 Wm. 4, c. 51, has conferred jurisdiction on the Vice-Admiralty Courts in the possessions abroad, or confirmed them therein notwithstanding the locality of the act complained of. But there is nothing in the statute to give to this Court jurisdiction in cases of collision, when, before the passing of that statute, this Court would not by reason of the subject of the collision have had jurisdiction. By the maritime law I apprehend that an action did not lie in the Admiralty in cases of collision in a harbour within the body of the county, between a ship or vessel and a boat or bateau of the description and used for the purposes for which this bateau was employed: and there is nothing in the statute to extend the jurisdiction of this Court to the subject-matter of this suit; for, the statute is confined in its operation to the case of "damage to a ship by collision." It is to be observed also, that without the statute it would probably be found that this Court would have no jurisdiction in cases of

(*b*) The Public Opinion, 2 Vict. c. 65, s. 6, passed on 7th Hagg. p. 398. But see 3 & 4 August, 1840.

collision in the harbour of Quebec (c); and as the Court LADY AYLMER. owes its jurisdiction to the statute, it could not be extended beyond the case of collision between ships, even though the collision in question in this cause, were of a maritime nature, which I have already said I think it is not (d). I must therefore pronounce for the protest, and dismiss the suit.

Maguire, in support of the protest.

Ahern, contra.

(c) George Okill Stuart's, (d) See case of Raft of Timber,
Lower Canada, Rep. p. 163, in 2 W. Rob. 251.
note.

Tuesday, 20th November, 1838.

CAPTAIN ROSS—MORTON.

CAPTAIN ROSS,

Seaman going into hospital for a small hurt, not received in the performance of his duty, not entitled to wages after leaving the ship.

JUDGMENT.—*Hon. Henry Black.*

This is a suit brought for subtraction of wages under the following circumstances. The promoter shipped as steward on board the barque Captain Ross, Digby Berkeley Morton master, on the 27th of April last, on a voyage from Liverpool to Montreal, or any other ports in British North America, and back to the port of Liverpool, or any other port or ports in Great Britain or Ireland, at the rate of 2*l.* 15*s.* sterling, per month, and received one month's pay advance. The promoter served on board the ship from the time of his shipping down to some days after the arrival of the ship at Montreal, in the early part of June last. He then complained of having a sore small toe, and wished to go into hospital; upon which the master sent for a surgeon, who after examining the toe was of opinion that amputation was the most effectual means of relief; and the next day was appointed for the operation. The promoter, however, swerving, the operation was not performed, and he left the ship—without notice to the master or his consent—and went into the General Hospital at Montreal, where he appears to have remained from the 8th of June to the 5th of July, during which time his toe was taken off. In the meantime the vessel sailed on her return voyage, and the promoter afterwards came to Quebec, where he has since remained; and on the return of the ship to this port, in the month

of October last, attached her for his wages. It appears CAPTAIN ROSS. that he had had his toe frostbitten about two years before this, on board of some other vessel, and it was to this cause he attributed his having this sore toe.

By the law of England and of the other maritime countries of Europe and America, the whole wages are given to the seaman, even when he has been unable to render his service, if his inability has proceeded from any hurt received in the performance of his duty or from natural sickness happening to him in the course of the voyage (*a*). But even in this case the seaman is not justified in leaving the ship and going into hospital, unless the sickness or hurt be sufficiently serious to justify such course. In this case the hurt complained of was not received in the performance of the promoter's duty, but anterior to his entering into the service of the ship; and did not, as appears from the evidence in the cause, require his leaving the ship. It was his duty at least to have given notice to the master before going to hospital. It was his business also—if the case had been such as to justify his remaining here during the period he was in hospital, and proceeding against the ship as upon a continuing engagement down to the time of his return to the port of shipment—to proceed to that port in another ship, upon being in a condition to do so. In which case the wages which he would have earned on the return voyage would go in deduction of his claim against the barque Captain Ross; and it appears here that he might have earned on such return from 4*l.* to 5*l.* per month, being nearly double the rate of wages which he was to

(*a*) Abbott on Shipping (Mr. Justice Story's edition of 1829), p. 442; Chandler *v.* Grieves, 2 Hen. Black. 606, note (*a*); 2 Boulay Paty, 232; Poth. Louage des Matelots, No. 189; Orde. 1681, Liv. iii. Tit. 4, art. 11; 1 Valin, 721; Sir James Graham's Act, 5 & 6 Will. 4, c. 19, s. 18; The Atlantic, 18th July, 1837, *ante*.

CAPTAIN ROSS. receive from the Captain Ross. I shall therefore decree wages only for the period of his actual service, that is, from the 25th of April to the 8th of June, deducting the advance of one month's wages.

Cannon, for the promoter.

Okill Stuart, contra.

Tuesday, 16th April, 1830.

SOPHIA—WEATHERALL.

Where a voyage is broken up by consent, and the seamen continue under new articles on another voyage, they cannot claim wages under the first articles subsequent to the breaking up of the voyage.

SOPHIA.

Defendant's bail is an incompetent witness.

Receipt in full is not taken as conclusive in this Court.

JUDGMENT.—Hon. Henry Black.

The brig *Sophia*, whereof the defendant was master, sailed from Liverpool in the month of September last, on a voyage to Quebec, or any other port or ports in British America, at the option of the master, and back to the port of Liverpool or any other port of discharge in the United Kingdom; and the promoter, a carpenter, with the rest of the crew, signed articles accordingly. The vessel having arrived at Quebec in the month of October of the same year, and the owner being desirous of sending her to Shediac in the Gulf of St. Lawrence, to convey troops thence to Quebec, and conceiving that he was not entitled, under the articles, to take the vessel to this port, called the crew together and gave them the option of being discharged from the articles and returning to England, or of going to Shediac under the articles. The promoter and two others of the crew accepted the latter option, seven of the original crew adopted the former. The voyage in the second articles is "from the port of Quebec to Shediac or any port in the Gulf St. Lawrence and back to Quebec, employed in the transport service." This voyage was accordingly performed by the promoter, and on the return of the vessel to Quebec, she was dismantled and laid up for the winter, the promoter working at the

SOPHIA.

dismantling of her, and upon this being completed he received from the owner wages and boarding down to this period. But the claims of the promoter goes further, and he insists that he is entitled to wages and boarding up to the 7th of May next, amounting to 37*l.* 10*s.* after giving credit to the defendant for 15*l.* This claim proceeds upon the principle that the promoter, notwithstanding the change in the voyage, continued to be in the service of the ship under the original hiring. I cannot consider that he was so. The master notifies the seamen that the original voyage was broken up. The whole crew, and the promoter with the rest, acquiesce in this. Undoubtedly they might have claimed to return to Liverpool, or some other port in the United Kingdom, and wages up to the time of their arrival as stipulated in the articles, allowing in deduction what they might earn. But as at that season of the year seamen could have no difficulty in obtaining a higher rate of wages than the rate of wages stipulated by the articles at Liverpool, this claim was fully answered by offering them their discharge, and if it were not, it was for them then to have preferred their claim against the ship. The conditions proposed by the master, upon breaking up the original voyage appear reasonable, and were consented to by the crew (a). The first voyage being thus determined at Quebec by consent, the second was determined at the same port by the articles, after which period the promoter could have no claim as for wages. I have not adverted to the receipt in full of all demands signed by the promoter upon receiving wages up to the time of the laying up of the ship in the port of Quebec; because the only evidence offered of its execution is derived from the testimony of the bail of the defendant, who is of course an incompetent witness; and at all events a receipt in full is open to

(a) *The Elizabeth*, 1 Dodson, 403.

SOPHIA.

explanation, and upon satisfactory evidence may be restrained in its operation. The fact of the payment of the money is established by other evidence, and by the admission of the promoter himself; and, taking the voyage to have determined under the second articles at Quebec—which I have already said I think it must be—the promoter has received all that he is entitled to under the articles. But the promoter seems to conceive himself entitled to board and wages subsequently to the determination of the voyage, on the ground that upon entering on the new engagement, the owner promised to find him employment during winter. There does not appear to me to be any evidence that the master or owner made any such agreement; and if such an agreement had been made, it would have been an agreement varying the contract of wages in the ship's articles of which parol evidence could not be introduced. Such a collateral engagement, too, if entered into and for a legal consideration, could not entitle the party to wages, but only to damages to be recovered in a court of common law for the breach of this convention. In this view of the subject, I decree that the promoter's suit be dismissed.

Maguire, for promoter.

G. Okill Stuart, for defendant.

Saturday, 26th December, 1840.

MARY CAMPBELL—SIMONS.

MARY
CAMPBELL.

Vessels are required, of a dark night, to show their position by a fixed light while at anchor in the harbour of Quebec; and the want of such light will amount to negligence, so as to bar a claim for an injury received from other vessels running foul of them.

Master may avail himself of the wind and tide, and sail into port by night as well as by day.

By-Laws of Trinity House not abrogated by desuetude or non-user.

JUDGMENT.—*Hon. Henry Black.*

This is a claim for damages on the part of the ship Jamaica against the ship Mary Campbell, incurred in the night of the first of October last, in the port of Quebec, by running against the Jamaica through negligence or want of skill of the persons on board of the Mary Campbell. It is in proof that the collision took place between nine and ten o'clock at night, and that the night was dark, and at that time there was no moon above the horizon, and the wind was fresh, and the tide strong, running up the river; and the Jamaica was at anchor in the stream, and there was no light shown on board the Jamaica. It further appears that by the by-laws and regulations of the Trinity House, all ships or vessels, in dark nights, at anchor in the stream opposite the town must show a light on the bowsprit end on the flood tide, and at the mizzen peak or ensign staff on the ebb tide. It is also in proof by the testimony of the harbour master and a member of the Trinity House of Quebec, and of the superintendent of pilots, and also a member of the Trinity House, that every night is considered to be a dark night when the moon is not up; that an extract from the by-laws and regulations of the Trinity House is

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given to every captain of a ship upon his arrival in the harbour of Quebec, and these witnesses have no doubt that the master of the Jamaica received one.

The above facts appear without the testimony of the master of the Jamaica or of the pilot of the Mary Campbell, and I am of opinion that the want of a light on board of the ship Jamaica, at the time of the collision, is fatal to the claim of the libellants for damages. The power of the Trinity House to make the regulation is not questioned, and the non-compliance with the by-law or regulation in respect to the light, by the master of the Jamaica, at the time and under the circumstances, was a negligence that creates a bar to the claim for damages. I consider the objection to be insurmountable, and that this single objection renders all the questions that might arise in the case of no consequence.

The by-law of the Trinity House I assume to be valid and binding, and founded on competent authority; and the suggestion that the non-user has destroyed the force and obligation of the rule is wholly groundless. There is no such principle in the English law that a statute authority or direction can be repealed or lose its efficacy by non-user (a). The mode of abrogating or repealing statute law by desuetude or non-user is not only unknown to the English law, but would be pernicious and dangerous. The Court of King's Bench in *White v. Boot* (b) promptly discarded such a doctrine. Assuming then the existence, validity, and operation of the Trinity House regulation of the vessels in the harbour of Quebec, the master of the Jamaica was bound to take notice of it. The evidence of disinterested witnesses of credit and character goes to show that the master of the Jamaica was duly informed of the regulation, and was served with a copy of it. How then can

(a) 2 Dwarria, 672.

(b) 2 T. R. 274.

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the libellants be permitted to talk of desuetude, or to prefer a claim of damages to their ship by a collision in a dark night, from a ship coming into the harbour under a fresh wind and tide, when they had neglected to give the requisite token of their presence and position in the harbour ?

If the regulation of the Trinity House is to be put out of view, as if it had no legal existence (although I do not well see how it can be done), then the case is to be governed by the particular circumstances attending it, and the legality and weight of the testimony.

I entertain no doubt that the master of the Jamaica, and the pilot of the Mary Campbell, were interested witnesses, inasmuch as the case resolves itself into a question of negligence or want of due skill and care in those persons who at the precise time had the control and direction of the vessels ; and the master and the pilot are equally interested in clearing themselves of fault, and throwing it upon the other party (c). But this point seems not to be important in any view, for all material facts are in testimony by other witnesses ; and the case is not one in which their testimony may be admitted from necessity, although they may be interested witnesses.

The weight of evidence is decidedly in favour of the fact that the night was quite dark at the time of the collision, and the darkness of the night is a matter of fact to be ascertained by parol proof before a Jury, or a Court of Equity or Admiralty Jurisdiction, which can deal with matters of fact. The superintendent of pilots (Young) and the chief and second mate, and a carpenter on board the Mary Campbell, all prove the night to have been dark. If so, I think that the Jamaica, independent of any Trinity regulation, ought to have shown her position by a fixed

(c) See the case of the Lord John Russell, 25th August, 1838.

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light, in such a port as Quebec, and lying in the stream, with a fresh wind and tide up the river (*d*).

I do not perceive anything like negligence or want of skill on the part of the Mary Campbell, for she had a right to avail herself of the wind and tide, and sail into the port by night as well as by day. She appears to me to have been free from blame, and as I have already observed, the want of a light raises the inference of negligence on the part of the Jamaica, and that destroys the equity of the claim to any damages in the case of such an accident, arising from the darkness of the night: and when we recur again to the regulation of the Trinity House, the disregard of that regulation of law defeats the title to damages entirely (*e*).

(*d*) In reference to the rule existing in some ports, requiring lights to be hung out conspicuously in dark nights, it was said in *Carsley v. White*, 21 Pick. 154 (Massachusetts Reports), that there was no general and absolute usage on the subject, and that the omission of the light might or might not be a fatal negligence, according to the circumstances. But the Ch. J. of Pennsylvania in *Simpson v. Hand*, 6 Whart, 324, more justly considered that the hoisting of a light in a river or harbour at night, amid an active commerce, was a precaution imperiously demanded by prudence, and he did not see how it could be considered otherwise than as negligence *per se*.

(*e*) "That all ships or vessels, in dark nights, at anchor in the stream opposite the town, shall show a light at the bowsprit end with the tide of flood, and at the ensign staff or mizzen peak with the tide of ebb: and in default

thereof shall incur a penalty not less than forty shillings, and not exceeding five pounds, to be paid by the master of such ship or vessel for every such offence."—By-laws, Rules, and Orders of the Trinity House, Quebec, of 28th June, 1805. Sec. 2, art. 4.

This by-law has since been repealed, and the following substituted for it:

"That the masters or persons in charge of ships or vessels at anchor in any part of the River St. Lawrence, between Green Island and the western limits of the port of Quebec, shall, during the night, cause to be placed on board of their respective vessels, a distinct light in the fore-rigging, twenty feet above the deck, under a penalty, for every neglect of this regulation, not exceeding ten pounds currency."—By-laws, Orders, Rules, and Regulations of the Trinity House of Quebec, of 12th April, 1850. Sec. 35.

Thursday, 18th February, 1841.

LEONIDAS—ARNOLD.

LEONIDAS.

In a cause of collision, where the loss was charged to be owing to negligence, malice, or want of skill; the Court, with the assistance of a captain in the Royal Navy, being of opinion that the damage was occasioned by accident, chiefly imputable to the imprudence of the injured vessel, and not to the misconduct of the other vessel, dismissed the owners of the latter vessel.

Rule of regulation when a ship is in stays, or in the act of going about.

JUDGMENT.—*Hon. Henry Black.*

This suit is brought by the owners of the ship *Mary Ann Hutton*, to recover the amount of certain damages sustained by that vessel from her being run foul of by the ship *Leonidas*, on the morning of the 1st of September last, off Point des Monts, in the river St. Lawrence, through the alleged negligence, malice, or want of skill of the persons on board of the *Leonidas*. The libel states that at one in the morning of the 1st of September, the *Mary Ann Hutton* was on the starboard tack (*a*), standing in towards the land at Point des Monts; that at this time or shortly after, the main sail of the ship was hauled up to enable her to stay with the watch then on deck; that while she was in stays, and was paying off without headway on her, the watch on deck saw the *Leonidas* on the lea beam of the *Mary Ann Hutton*, about three or four hundred yards from her and bearing down upon her; that the helm of the *Mary Ann Hutton* was then a-starboard, and that her mate hailed the *Leonidas* to starboard her helm and keep away, and that he was answered from the *Leonidas*, which vessel, however,

(*a*) This could not be, as Captain Bayfield remarks.

LEONIDAS.

continued her course, the wind being then west north west, and blowing a fine breeze, and the Leonidas going seven to eight knots an hour; that the Leonidas was repeatedly hailed from the Mary Ann Hutton, to *starboard her helm (b)* and keep away, but she did not, but on the contrary kept her luff, and struck the Mary Ann Hutton on the lee quarter, doing the damage complained of; that the Mary Ann Hutton, before and at the time of the collision, had a light conspicuously placed on her fore-stay, and that when she hailed the Leonidas, the master caused a lamp to be held up so that the people of the Leonidas must have seen it. On the part of the owners of the Leonidas it is alleged, in their responsive plea, that she was off Point des Monts, at one in the morning of the 1st of September last, the wind blowing then fresh from the west south west, and not from the west north west as alleged in the libel, and that the night was dark and hazy in shore towards the north of Point des Monts; that the Leonidas was then, and had been for an hour, standing on the starboard tack, out from the shore with nearly all sail set, and going about seven and a half knots an hour; that about two minutes or less before the collision, one of the watch of the Leonidas saw the Mary Ann Hutton on the lee bow of the Leonidas, and about one hundred or one hundred and fifty yards from her, at a great distance from the shore, and standing towards it, on the *larboard tack*, and not on the *starboard tack*, or in stays as alleged in the libel; that about that time the watch of the Leonidas heard a voice from the Mary Ann Hutton, calling out "put your helm up," and that the helm of the Leonidas was put up accordingly; that the Leonidas had a light on her fore-stay, but that the Mary Ann Hutton had not, though it is falsely alleged in the libel that she had; that at the

(b) That was to "put it up" as the Leonidas people say also, that they were told to do.

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time of the collision the Mary Ann Hutton had not her main sail hauled up, that she had her larboard tacks on board, and was not in stays, but that her main sail was set, all her yards the same way, that her sails were full and that she had way on her larboard tack; that the Leonidas being on the starboard, and the Mary Ann Hutton on the larboard tack, the latter was bound to give way; and that the collision did not occur by the inattention, neglect, nor want of skill on the part of those on board of the Leonidas, but by the negligence or want of skill of those on board the Mary Ann Hutton.

There are some contradictory statements made by the witnesses examined in the case, as there are and indeed must almost necessarily be in cases of this kind, and as to circumstances occurring in the darkness of night, and amidst inevitable confusion, and with regard to which the feelings of the witnesses on each side are strongly excited in favour of the views most favourable to their own vessel; but by a careful examination of the whole evidence, the facts appear to have been as follows:—

At the time mentioned in the libel and answer, the two vessels were off Point des Monts, bound upwards, with the wind rather fresh from the westward or down the river (the exact point from which it blew is of no consequence, both beating up the river with a contrary wind). The Leonidas had been for some time standing off the shore on the starboard tack, and was going from seven to eight knots an hour:—the Mary Ann Hutton had been standing towards the shore on the larboard tack, but at the time of the collision she was in stays, for the purpose of getting on the starboard tack and standing off the shore, or at any rate had not completed the evolution long enough to have way upon her, and to be under command. The night was dark, the distance from the shore was such that it was not necessary to the Mary

Ann Hutton to go about to avoid any local danger. No particular signal was made by the Mary Ann Hutton to show that she was in stays, or about to go into stays, until the Leonidas was within a few hundred yards of the Mary Ann Hutton, and could be and was hailed from her; and in fact neither of the vessels seems to have seen the other until they were within this distance, which, at the rate the Leonidas was going, she would sail in two or three minutes. When the Leonidas was hailed from the Mary Ann Hutton to put her helm up, she did so, and though this manœuvre does not seem to have been the best that could have been adopted, yet it was adopted by the Leonidas at the request of the people of the other vessel, and under circumstances which made it difficult to say what ought to be done. There was not sufficient time for the Leonidas to pass astern of the Mary Ann Hutton, and she struck that vessel on the quarter, doing the damage complained of.

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The general rule of navigation is, when a ship is in stays or in the act of going about, she becomes for the time unmanageable, and in this case it is the duty of any ship that is near her to give her sufficient room; but when a ship goes about very near to another and without giving any preparatory indication from which that other can, under the circumstances, be warned in time to make the necessary preparations for giving room, the damage consequent upon want of sufficient room may arise from the fault of those in charge of the ship going about at an improper time or place. Or, in the case of darkness, fog or other circumstances rendering it impossible for the ships to see each other, so distinctly as to watch each other's evolutions, the fault may be with neither. The law will support a claim for indemnification if it is shown that the vessel charged is the wrong doer; but not if the damages arise from the fault of the vessel injured, or are the result of a misfortune common to both vessels, with-

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out fault on either side. The real difficulty is not in determining the rule, but in ascertaining the facts to which it is to be applied. The circumstances of confusion, darkness and danger, under which such disasters commonly happen, and the strong feelings of the witnesses, all tend to place cases of collision among the most difficult which can be brought before a judicial tribunal. It is a great relief therefore to the Court to be assisted by a naval gentleman, whose professional experience and skill enable him to draw just conclusions from facts and evidence, which unprofessional persons could but imperfectly appreciate: and having proposed to Captain Bayfield, R. N. (the assessor in this cause) the following questions:—

1. What were the respective positions, of the two vessels a short time before the collision?

2. What was the relative position of the Mary Ann Hutton when she went into stays?

3. Was the Mary Ann Hutton justified in going into stays in her relative position with regard to the Leonidas?

4. If the Mary Ann Hutton could see the Leonidas, and yet gave no intimation, visible and intelligible to that vessel, of her intention of going about, was the collision consequent upon her neglect to give such intimation?

5. Did the Leonidas do right in putting her helm up, when the danger of collision became apparent?

6. Did the collision occur through the inattention, want of skill, or malice of the persons on board the Leonidas?

The Court has received from Captain Bayfield his answers in writing, prefaced by some remarks explanatory of the reasoning upon which he has come to the conclusions he enounces, and in the following terms:—

“It is necessary, before giving an opinion upon the case of collision between the Mary Ann Hutton and the

Leonidas, which has been submitted to me, that I should offer some few brief remarks, explanatory of the nautical parts of the subject, and also of the grounds upon which my opinion has been formed.

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"In the first place, I am compelled to notice the contradictory statements of the libel, in which it is affirmed that the Mary Ann Hutton was on her starboard tacks, standing for the land of Point des Monts: the latter part of the statement being impossible if the former be true, and the wind, as alleged, from the westward. So also is it impossible that the Leonidas could have been bearing down upon the Mary Ann Hutton and on her lee beam at the same time. These opposing statements render it impossible to ascertain what tack the Mary Ann Hutton was on at the time of the collision. Neither does the statement that the Leonidas struck her on the lee quarter afford any explanation, since either quarter might have been the lee.

"I shall next consider the evidence of the promoter's witnesses. They concur in stating that at one o'clock on the morning of the first of September, 1840, the wind then being moderately fresh and from the westward, the Mary Ann Hutton was in stays from the starboard to the larboard tack, but had not quite completed the evolution. She had come round with her head to the northward, but had not finished the trimming of her sails, or gathered way through the water so as to be under command of her helm, when the Leonidas came up on the starboard tack, and the collision took place.

"Now, it clearly appears from this evidence, that the Mary Ann Hutton must have hove in stays right across the course, or directly in the way of the Leonidas, and at an imprudently short distance ahead of her: for, that distance could have been no more than that which the Leonidas sailed in the few minutes which elapsed from the commencement of the evolution of staying on board

LEONIDAS. the Mary Ann Hutton until the collision, which took place before its completion.

“It is customary at sea, especially at night, when a vessel is similarly situated with respect to another, as the Mary Ann Hutton thus appears to have been in relation to the Leonidas, that is, at so short a distance ahead or on the lee bow, that she could not stay without danger to both vessels to make some signal, either by showing a light over her stern or otherwise,—and waiting till an answering light had shown that the people on board the other vessel were on the alert and aware of their intention. Therefore, if the Leonidas could have been seen from the Mary Ann Hutton, and the persons in charge of the latter vessel failed to give those of the Leonidas any such intimation of their intention to stay, then in that case, they of the Mary Ann Hutton became in great measure answerable for the collision and its consequences, although I think not so entirely so, as to free the people of the Leonidas from all blame, for they ought to have vigilantly watched the motions of the Mary Ann Hutton, under such circumstances, it being part of a seaman's duty to be prepared for any accident, imprudence, or want of judgment on board other vessels near him.

“But, it does not clearly appear in evidence that the Leonidas was seen from the Mary Ann Hutton before she commenced the evolution of staying, for although the mate deposes that the night was rather clear, and that he thinks he could see two miles, yet he says that it was while his vessel was in stays that he and several others of the crew discovered the Leonidas. Again, in his cross-examination, he says, that he saw the Leonidas ten minutes before the collision, which, at the rate she is proved by those on board of her to have been sailing at the time, indicates a distance of at least a mile, and yet he adds that when seen by him she was distant only about four or five hundred yards.

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"The same discrepancy, between the time stated to have elapsed from the discovery of the Leonidas to the collision, and the distance at which she was first seen, occurs in the evidence of all the promoter's witnesses. Those witnesses depose, either directly or in substance, that the night was sufficiently clear for a vessel to have been seen at the distance of about two miles, and yet that they did not discover the Leonidas until she was within a distance of from two hundred to five hundred yards, whence it appears, either that the night was not so clear as they now think it was, or that they kept no proper and sufficient look-out.

"Turning now to the defendant's evidence, I find that the witnesses on the side of the defence agree in stating, that the night was dark, especially to the southward, or in the direction of the Mary Ann Hutton; that the Mary Ann Hutton was first seen about two minutes before the collision, that she was on the lee bow, at the distance of about two hundred yards; and that they lost sight of her again in an equally short space of time after the collision.

"The master states that he did not stop to render assistance, because, from the slightness of the shock to his own vessel, he did not conceive any to be required, and because he neither saw nor heard any indication from the Mary Ann Hutton that she required any.

"All the witnesses for the defence declare that the Mary Ann Hutton was not in stays, but of this I cannot consider them to have been competent to judge, in the confusion which they mention, and in a night so dark as they state it to have been, for the sails of the Mary Ann Hutton may have been as they state, all full on the larboard tack, and yet they may not have been long enough so for the vessel to have gathered way, so as to have become under command of her helm. I consider, therefore, that their testimony on this head cannot justly be put in competition with that of those who were on board the Mary Anne

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Hutton, any more than I can allow that these latter were competent to decide whether the helm of the Leonidas was or was not instantly put up in obedience to their call. The evidence of the promoter and defendant respecting the main-sail of the Mary Ann Hutton, whether it was clewed up or at full drop, is in direct opposition, but the fact is immaterial.

"Having thus reviewed the evidence, and fully and deliberately weighed all that has been adduced in support and in defence of this action, I have come to the following conclusions :

"1. That it is established in evidence that a few minutes before the collision took place, both vessels were standing from the land near Point des Monts to the southward, being both on the starboard tack with the wind from the westward, the exact point being unimportant.

"2. That the Mary Ann Hutton hove in stays directly in the way of the Leonidas, and so near her that there was not time to complete the evolution of staying before the collision took place.

"3. That her staying so near to the Leonidas, and in such a relative position in respect to her, as it appears from the evidence she did, could only be free from the charge of the most blamable imprudence, by the supposition of her not being able to see the Leonidas, on account of the darkness of the night.

"4. That if they of the Mary Ann Hutton could have seen, or did see the Leonidas, and yet gave her no intimation of their intention to heave in stays directly in her way, they are at least as much answerable for the collision and its consequences as the people in charge of the Leonidas.

"5. That if the night was so dark that the vessels could not be seen from each other, at the time when the Mary Ann Hutton commenced the evolution of staying, and that the Mary Ann Hutton was still in stays, and without headway, when the Leonidas came up, then in that case it

would appear, from the relative position of the vessels, that the *Leonidas* must have gone clear of her by luffing to windward, which, being on the starboard tack, it was her place to do, and which it appears she was about to do when the call from the people of the *Mary Ann Hutton* induced her to put her helm up, an act which, although it proved unsuccessful in avoiding the collision, can scarcely, under the circumstances, be considered as entailing blame upon either party. In this case, therefore, I should consider the collision entirely accidental.

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"6. I am therefore of opinion, that it has not been proved that the collision occurred 'solely through the inattention, want of skill, or malice of the persons on board of the *Leonidas*.'

"HENRY W. BAYFIELD."

Concurring in the views taken by Captain Bayfield, and in the conclusions stated in his answers, I must pronounce that the *Leonidas* is not liable for the consequences of the collision, and that the owners of that vessel must consequently be dismissed from this suit (c).

Gairdner and Stuart, for the *Mary Ann Hutton*.

Horatio S. Anderson, for the *Leonidas*.

(c) "STARBOARD," "LARBOARD," "PORT."—G. A. J., who inquires about the derivation of these nautical terms, will recollect that the Venetians and Genoese were among the earliest European navigators; and formed during the middle ages, and even later, the most powerful maritime states. It is, therefore, extremely probable, that the Italian language is that in which we are to look for the origin of most of our nautical terms of old standing. I have long sup-

posed that the terms "starboard," "larboard," and "port," had an Italian origin.

Thus we have "questo bordo," *this side* of the vessel, or the side on which the helmsman stood; "quello bordo," *that side*, or the one opposite to him; *bordo*, being "tutta quella parte del vascello, che dai fianchi sta fuor dell'acqua." These terms would naturally come to be abbreviated to 'sto bord', 'lo bord'.

Then, again, the master, when directing the helmsman to put

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the tiller over to the larboard side of the vessel, or that opposite to him, would naturally indicate it by the word *portare*, to carry or push; "*porta il timone*," "port your helm," as distinguished from *tirare*, to pull.

In process of time, in order to obviate the risk of confusion between the sounds '*sto bord*', '*lo*

bord', "starboard," "larboard," inasmuch as porting the helm always indicated the larboard side of the vessel, the word *port* came to express it altogether.

It is a mistake to suppose, as Mr. Bosworth does, that the Anglo-Saxon *steorbord*, is from *styran*, to steer. — Notes and Queries.

Friday, 12th November, 1841.

THE MIRAMICHI—GRIEVE.

MIRAMICHI.

In a case of collision against a ship for running foul of a floating-light vessel, the Court pronounced for damages.

In such case the presumption is gross carelessness, or want of skill, and the burthen is cast on the ship-master and owners to repel that presumption.

This was a claim on the part of the Trinity House of Quebec, as the owner of the schooner Brilliant, for damages done to her by the barque Miramichi, in coming up the river St. Lawrence.

JUDGMENT.—*Hon. Henry Black.*

I have given the case the best examination and consideration in my power, and my mind has come to the conclusion that the owners of the barque Miramichi are chargeable, in the character of owners, with the collision, and are responsible for the damages sustained.

I do not perceive sufficient ground to impute fault, or want of due care or skill, to the master or crew of the schooner Brilliant. That vessel was strongly and safely moored in her usual station, as a beacon or a floating-light vessel, and every way competently equipped, and with her lamps lighted and blazing at the time. It was her business to remain stationary and quiet, and of all vessels passing up or down the St. Lawrence to observe her, and to keep clear of her. She was anchored on the south side of the channel, which at that place was one mile wide. The barque was first seen at the distance of a mile, coming directly towards the Light vessel, with wind and tide in her favour, and all sails set. As she continued her course, one of the seamen of the Brilliant

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(Gagnon) became alarmed and rang the bell, and called up the master and crew. The barque approached rapidly, and was to the windward of the Brilliant. She appeared to two of the crew of the Brilliant to be intending to go to the southward of the Brilliant, but suddenly appeared as if changing her course so as to pass to the northward of the Brilliant; and some of the crew of the Brilliant called out starboard, and the word starboard was repeated from the barque. The approach was too rapid, and the proximity too close to change the course, and the collision took place. The master, when he came on deck and saw the danger impending, ordered the helm to be put hard a starboard, and he thought it was done, and that the Light-ship sheered to the north, though not exceeding five feet. But, on this point of sheering, he might have been mistaken, for Gagnon, the seaman, was the person who went to put the helm a starboard, and he was endeavouring to unlash the helm, but did not succeed before he was called away; and the helm was not unlashed, nor put a starboard, nor did the Brilliant sheer at all. In this fact the two witnesses, Gagnon and Peltier, concur.

Then, what ground was there for imputing any negligence, or misconduct, or want of skill to the master or crew of the Brilliant? There is nothing, unless it be that they communicated orders to the barque to put the helm a starboard, and which was done accordingly. Had it not been for that fatal order the witnesses on the part of the defendants are of opinion that the barque would have gone to the northward, and clear of the Light-vessel. It does not appear to me from a comparison of the testimony that the conclusion is well drawn. The witnesses for the barque assume as a fact that the Brilliant sheered across the bows of the barque, whereas those who knew best,—the crew of the Brilliant,—declare that she did not sheer at all; she could not, because the helm was lashed and consequently unmoved. Then here stands the fact

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unshaken, that the Light-vessel remained fixed and stationary, and the order to starboard her helm did not produce the collision. The vessels were within two hundred feet, or within one and two hundred yards of each other when the order, starboard, was given. The collision was too instantaneous after this order to allow it full effect. Indeed, a witness for the defendant (James Taylc , says that if the barque had not put her helm a starboard as ordered by the Brilliant, they would have run down the Brilliant, *as she sheered across the bows of the barque*. Now, she did not sheer at all, and yet, peradventure, the order from the Brilliant saved her from being sunk. The barque had sheered directly at or too close to the Light-vessel, and the error was discovered too late and was fatal, and the cry from the crew of the Brilliant was in the moment of anxiety and extremity. The course of the barque was not clearly defined, and it is quite uncertain whether a collision would not have taken place if there had not been a voice uttered or a stir made on board the Light-vessel. Coulton, the chief mate on board of the barque, cannot say whether the Light-ship sheered ; he only knows that one of the vessels did sheer, and he believes, *though he cannot say with certainty*, that if the barque had continued her course, before the helm was put a starboard, and the Light-ship had remained stationary, that she would have passed clear of the Light-ship to the northward. Ought the barque to have left a doubt on that point, when she had a mile of sea room to the northward of the Light ? So the witness (Taylor) *thinks* the barque would have passed between the Brilliant and the north shore, if the order "starboard" had not been uttered ; and another witness (Allen) *cannot say* if the order to starboard the helm had not been given, that the barque would have run clear of the Light-ship, as it would depend upon the force and run of the tide. The witness Scott, also believes that in such a case the barque could have run clear, but

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cannot be positive, as he was not acquainted with the way the current sets in. I conclude that there is no obstacle on the part of the libellants to a claim for damages arising from the conduct of the captain or crew of the Brilliant.

I am of opinion that fault or blame, or want of care or skill, or all of them are imputable to the barque, and that the owners must answer for the damages produced by the collision. The barque had not a regular pilot on board, and she was within the regular pilot ground, and three branch pilots belonging to the river navigation of the St. Lawrence were witnesses in this case. No excuse appears, and no reason is assigned why a licensed pilot was not procured. It is to be presumed that such an officer would have conducted the barque quite clear of any collision, and he would have known the force and direction of the strong and rapid currents of the river, and how to avoid or control them. When a ship runs foul of a stationary object placed as a beacon for direction and to be avoided, the presumption is gross carelessness or want of skill, and the burthen is cast on the shipmaster and owners to repel that presumption. The stationary vessel is inert and helpless, and the sailing ship has command of the time and place, of the winds and the currents, and it becomes her exclusive duty to avoid collision with the other. No doubt, a vessel at anchor in the stream of a navigable river, must also perform her duties. If it be in the night she must have a light hoisted to mark her position, and an anchor watch on deck, or she will lose her claim for damages in a case where a vessel under full sail runs foul of her. But in the present case the Light-vessel was in the performance of her stationary duty, and was casting her lights and her watchful eye to a distance around her. The error and want of due care in the barque was in continuing to steer directly on the light of the Brilliant, and not altering in due season her course more to the north-

ward. Her fault was in approaching so near to the Light-ship that the force of the current and the rapid motion of the ship, brought her into a difficulty from which she could not extricate herself. Here was want of skill, and care, and knowledge of the current and of its rapidity. It was a fault in the barque to place herself in such a position. She steered so near to, if not directly at the light, at her own peril, and she must abide the consequence. The case of the *Neptune the Second* (a) shows how ships moored are protected against the intrusion of ships under sail, and the case of the *Mary Campbell* (b) shows on the other hand how the want of due attention in the stationary ship at anchor deprives her of remedy for collision.

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In the present case the object of the barque would seem to be to steer as close as possible to the Light-vessel and not touch her. It was a rash, unskilful, and hazardous experiment; she had no business to implicate herself in the neighbourhood of a floating light. There was "ample room and verge enough" to the northward, and I think that upon settled principles of admiralty law and of justice she ought to indemnify the libellants for the injury they have sustained, and I pronounce accordingly.

E. L. Montizambert, for the Trinity House.

R. H. Gairdner and *A. Stuart*, for the Miramichi.

(a) 1 Dodson's Ad. Rep. 467.

6 Warton's Pen. R. 311, as to

(b) Vice-Admiralty Court at Quebec, 26th December, 1840.

See the case of *Simpson v. Hand*,

the want of due attention in a stationary ship at anchor.

Friday, December 17, 1841.

THE DAHLIA—GROSSARD.

DAHLIA.

COLLISION.—The omission to have a light on board, in a river or harbour at night, amounts to negligence *per se*.

Every night in the absence of a moon is a dark night in the purview of the Trinity House regulations.

More credit is to be attached to the crew that are on the alert, than to the crew of the vessel that is placed at rest.

The regulations of the Trinity House require a strict construction in favour of their application.

JUDGMENT.—*Hon. Henry Black.*

This is a claim for damages on the part of the brig Xenophon against the bark Dahlia, incurred in the night of the 19th of September last, in the port of Quebec, by running against the Xenophon as she lay at anchor.

The evidence consists of the testimony of eight witnesses on the part of the claimants, and of ten witnesses on the part of the defendants. There is a good deal of contradiction in the testimony, especially in respect to the degree of darkness, and to the distance in which objects might be seen at the time of the collision. But there are facts sufficiently established by proof to enable us to determine to whom fault, or want of due care, is to be imputed, and upon whom the damage resulting from the collision ought to fall.

The collision occurred about half after eight o'clock in the evening of the 19th of September. The sun had been down upwards of two hours, and the new moon had set. There was no other than starlight in the firmament. There was no light hoisted or shown at the time, from the brig Xenophon, as required by the By-laws of the Trinity House. Those regulations required that "all ships or vessels in dark nights, at anchor in the stream

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opposite the town, should show a light at the bowsprit end on the flood tide." Was it a *dark night* at the time of the collision in the purview of the Trinity House regulations? Mr. Lambly, Harbour Master for the port of Quebec, considers a dark night, within the meaning of the By-laws, to be one in which there was neither moonlight or starlight existing at the time of the collision. As there was starlight existing at the time of the collision, the *Xenophon* was not bound by the Trinity House regulations to exhibit a light, according to the construction given to them by Mr. Lambly. But I cannot accede to this construction; it is too large and latitudinarian, and does not afford that security to the trade of the port which was intended and ought to be given. Every night in the absence of the moon is a dark night; the word is used in contradistinction to moonlight nights. The rules do not look to pitchy or Egyptian darkness, but to that degree of darkness or obscurity which hovers over the earth in the absence of sun and moon, and which must inevitably render hazardous and difficult the movements of vessels in a narrow stream, and impelled by "smart breezes" and rapid currents, and surrounded on all sides by vessels at anchor, and by the gloom and indistinctness of adjoining precipices.

The witnesses differ exceedingly as to the degree of the darkness, and how far objects could be distinctly seen. I attach the more credit to the witnesses on the part of the *Dahlia* on this point. The crew were all up and on the alert and look out, and under a pressing necessity to look sharply. On the other hand, the crew of the *Xenophon* had placed the vessel at rest, and all but the mate had retired from deck, and their attention and vigilance were not in requisition. The master of the *Dahlia* states that, if the *Xenophon* had shown a light, the *Dahlia* would not have been brought to, at the time and place selected, and the collision would have been avoided. The

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mate asserts that the bark would have seen the light—had one existed on board the *Xenophon*—before the *Dahlia* rounded to under the stern of the large vessel ahead, and the collision would have been saved. We are therefore warranted by the testimony to conclude that the want of a light on board the brig was one procuring and substantial cause of the casualty. And whatever indiscretion may be imputed to the *Dahlia*, in carrying so much sail and rounding to at the time and place she did, the brig *Xenophon* is chargeable with a fatal default in the case, and which I think defeats her claim for damages.

I cannot but be of opinion that the evening was sufficiently dark to require a compliance with the Trinity House regulation, and it strikes me that the regulation requires a pretty strict construction in favour of its force and application, and that it would be very unsafe and contrary to sound policy, to leave the question of the degree of darkness to the loose and interested, and conflicting opinions and conjectures of the crews of the vessels in the port, so long as we have so definite and certain a test of darkness as that arising from the fact of a night without a moon. The Ch. J. of Pennsylvania in the case of *Simpson v. Hand* (a), in which a vessel was anchored at night in the channel of the river Delaware without a light, and for want thereof was run into, very stringently observed that having a light on board was an indispensable precaution, and the omission in a river or harbour at night amid an active navigation amounted to a negligence *per se*.

For these reasons, I am of opinion, that the claim on the part of the *Xenophon* ought not to be sustained.

Duval and Anderson, for the *Xenophon*.

Gairdner and Stuart, contra.

(a) 6 Wharton, 311.

10th August, 1842.

DUMFRIESSHIRE—GOWAN.

In order to prevent proctors from proceeding in causes, on instructions from parties not possessing a legal *personæ standi* to prosecute a cause, the Court may require the production of proxies.

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SHIRE.

JUDGMENT.—*Hon. Henry Black.*

The Honorable Charles Richard Ogden, Her Majesty's Attorney-General for Lower Canada, being absent from the Province, there were instituted in this court several suits for the recovery of penalties under the Passengers Act, 5 & 6 Wm. 4, cap. 58, the 18th section of which directs that the proceedings shall be prosecuted as for offences under any Act of Parliament now in force for the prevention of smuggling or relating to the customs, or to trade or navigation; and accordingly any such penalty or forfeiture came to be recoverable according to the Act regulating the trade of the British possessions abroad, 3 & 4 Wm. 4, c. 59, the 66th section of which provides that no suit shall be commenced for the recovery of any penalty or forfeiture except in the name of some superior officer of the customs or navy or by His Majesty's Advocate or Attorney General for the place where such suit shall be commenced. The proceedings in these suits are commenced in the name of the Attorney-General, and signed "C. R. Ogden, Attorney-General, per F. W. Primrose, Queen's Counsel, duly authorised." The defendants having appeared and given the usual security, moved "that the Honorable F. W. Primrose do produce his

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proxy and the authority under which he instituted, and prosecutes the present cause or business before the Court." Mr. Primrose resisted the application, and the Court having ordered the production of the proxy, and the order not having been complied with, the Court cannot do otherwise than maintain the motion made to dismiss the defendants from all further observance of justice in these causes, and the bail given on their behalf to answer the actions from the recognisances by them entered into, and from all further observance of justice therein. It is true that in the more modern practice of the Admiralty Courts the rules respecting the production of proxies have been relaxed for the convenience of the practitioners; and proctors have been permitted to appear on behalf of parties without being called upon to exhibit any proxy. But, the principle has never been abrogated, and the rules established by His Majesty in his Privy Council, on the 27th of June, 1832, expressly declare that proxies may be required, in order to prevent proctors from proceeding in causes on instructions from parties not being themselves entitled to intervene, or not having a legal *personæ standi*, to prosecute a cause. During the absence of the Attorney-General the powers and duties of the office devolved upon the Solicitor-General as stated by Lord *Mansfield* in *Wilkes's Case* (a), and by Lord Chief Justice *Wilmot*, in delivering the unanimous opinion of the judges before the House of Lords, in the same case (b). The Solicitor-General's authority might readily have been obtained by Mr. Primrose, who could then have exercised all such powers as might by such authority have been confided to him. The instructions prosecute appear to have emanated from the emigrant agent, a party not being himself entitled to intervene, nor having a legal *personæ standi* to prosecute, and the cases

(a) *Wilmot's Opinions* and (b) 4 *Burrow's Rep.* p. 2548.
Judgments, p. 329.

are therefore within the rule above mentioned, which the Court cannot do otherwise than apply.

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Hon. *Francis Ward Primrose, Q. C.*, for Attorney-General; *H. S. Anderson*, for Defendant.

LADY SEATON—TALBOT.

DROMOHAIR—PYNE.

INDEPENDENCE—M'CAPPINE.

Per Curiam.

These cases being in the same situation as the last, the same judgment must be entered.

Report of the law officers of the Crown on the subject of certain appeals, asserted by the Honorable Francis Ward Primrose, from decrees of the Vice-Admiralty Court, Quebec.

To His Excellency The Right Honorable Sir Charles Bagot, G. C. B., Governor-General of British North America, &c. &c.

May it please your Excellency.

In obedience to your Excellency's commands we have attentively examined the proceedings in the Vice-Admiralty court, in the case of the Attorney-General *v.* James Gowan, master of the Dumfriesshire, together with the correspondence between Mr. Secretary Rawson, and the Honorable Mr. Primrose, Queen's Counsel at Quebec, in relation to that case, as well as to the conduct of Crown cases generally, by the Queen's Counsel in the absence of the Attorney-General, and we have the honour to submit this our report for the consideration of your Excellency.

The suit against the master of the Dumfriesshire,

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was brought by Mr. Primrose, in the name of the then Attorney-General, to recover a penalty for an alleged infringement of the Passengers Act, 5 & 6 Wm. 4, c. 58, from the instructions given to him by the chief agent for emigrants, without any proxy from the Attorney-General who was in England on leave of absence. The Court proceedings were signed "C. R. Ogden, Attorney-General, per F. W. Primrose, Queen's Counsel, duly authorised."

The master of the vessel appeared by his proctor in the Vice-Admiralty court, entered into the usual stipulation or bond, and in due course moved that "the Honorable F. W. Primrose do produce his proxy, and the authority under which he instituted and prosecutes the present cause or business before this Court."

Mr. Primrose resisted this application, but the judge sustained it and ordered the production of a proxy, and this order not having been complied with, the suit was afterwards dismissed. A representation upon the subject having been made to your Excellency by Mr. Primrose, he was directed to assert an appeal from the judge's decree, and in future cases to use the name of the collector of the customs, under 66th section of the Act 3 & 4 Wm. 4, c. 59, and the 18th section of the Passengers Act, in order to avoid similar objections.

Mr. Primrose has very correctly stated that the new Passengers Act having completely altered the mode of proceedings to be had in future, the decision of this question (the necessity of a proxy), in so far as that Act (5 & 6 Wm. 4, c. 58) is concerned, is a matter now of indifference. With reference however to the Crown cases generally, both in the Vice-Admiralty and other courts, the question raised in the case of the master of the Dumfriesshire is no doubt of great practical importance, as the personal attendance of Her Majesty's Attorney-General for Lower Canada, in all the courts, is rendered impracticable, by the judicial organisation of these courts

into distinct and separate tribunals, possessed of equal powers and of the same jurisdiction, which they exercise at the same time in different and distant districts.

In examining the question we could not fail to observe the essential difference in the practice of the Admiralty from that in use in the other courts. The Admiralty Courts administering the civil law of Rome, have closely followed the procedure of the Roman system. Hence at the outset of a suit in imitation of the old Roman stipulations or bonds *judicatum solvi, de judicio sisti, et de rato*, a defendant is required in the Admiralty to give bond by which he and his sureties submit to the jurisdiction of the Court, bind themselves to answer the action, to abide the hearing of the cause, to satisfy the condemnation, and to pay what is adjudged with expenses. This bond at the present day, like the old stipulation, is given technically, not by the party but by his proctor. "The stipulation *de rato*, as it was shortly called, or *ratam rem habiturum dominum*, was one required of the proctor of the actor or plaintiff, by which he was required to give security that the principal should ratify his acts. Digest. Lib. 46, Tit. 8. *Ratam rem haberi, et de ratihabitione*. It was not required universally, but only when it was not clear whether the proctor was or was not authorised to act for the principal in the matter in question. Code 2, 13, 1. Vinnius in Inst. 4, 11, in princip., No. 1. The reason of the rule is obvious; if he had authority, the stipulation was unnecessary; if he had not, the judgment would not be binding on the plaintiff, and the defendant might be called on to litigate the same question again; *periculum enim est iterum dominus de eadem re experiatur*. Gaii Instit. 4, 92, Justinian Instit. 4, 11, in principio. If there was no question of the proctor's power to act for the principal, as if he had been constituted proctor in Court *apud acta*. Code 2, 57; or if a written authority was in the defendant's hands, the stipulation was not

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required, Dig. 3, 3, 65."—American Jurist, No. 33, p. 69, in notes.

The rules of practice settled at Doctors' Commons for the use of the Vice-Admiralty Courts, under the statute of the 2 Wm. 4, c. 51, pursuing the old Roman law, expressly require that a proxy when called for shall be exhibited by the party.

In the case of the Dumfriesshire, had the proceedings been actually conducted by the Attorney-General in person, no proxy would have been required, as the Court was bound to recognise the known official assenter of the rights of the Crown, and the Queen's constituted attorney, to represent Her Majesty in her courts of justice. The official character of the Attorney-General is his proxy: Mr. Primrose represented himself before the Court in the capacity of Queen's counsel, duly authorised by the Attorney-General, and the question arises whether the Court was bound *ex officio* to recognise him in that character, as it would have recognised his principal, the Attorney-General. From the *formula* used by Mr. Primrose he did not attach to his patent of Queen's counsel, an implied authority at his own discretion to sign and act for the Attorney-General, nor could he legally possess any such authority; it is, "as duly authorised by the Attorney-General." That Mr. Primrose was not authorised, he states himself that the Attorney-General was in England; he does not state that he had a general authority from the Attorney-General to use his name of office, but he justifies his proceeding under instructions from the proper government officer, "with knowledge and sanction of government." The term proper officer, here refers to the chief agent for emigrants, who clearly could confer no authority to use the name of the Attorney-General, and as to "knowledge and sanction of government," such vague terms cannot be understood to supply any additional authority.

Under a system of practice which authorises a defendant to call for the power or proxy of the adverse agent or proctor, in a case where that agent professed to act upon an authority delegated to him by another, and where the sufficiency of that authority, if produced, might have been questioned, the Admiralty judge required the production of a proxy.

In reviewing the proceedings of his Court, we cannot but acquiesce in the legality of his judgment.

On the other hand, advertent to the practice of the Common Law Courts of Lower Canada, we find a totally different system prevailing, under which it is an axiom that the authority of an attorney cannot be questioned by the opposite party. The doctrine of stipulations is wholly unknown in these courts, and attorneys are officers acting for their clients, and in their names, under the control of the several tribunals. There is no rule of law by which one attorney may not delegate to another the power of acting, and therefore of signing acts for him, and there is even an express rule, in the Court of Appeals which enjoins upon attorneys residing out of the city of Quebec, to appoint an attorney resident there as an agent for them. We are not aware of any rule either in the practice of the Courts in England, or in either of the sections of this Province, by which the Attorney-General, or any other attorney, may not delegate to a professional brother the power of signing legal proceedings for him and in his name. The argument *ab inconvenienti*, resulting from the organisation of the Courts of Lower Canada, would be easily shaken by a judicial decision founded upon some known rule of law. But if precedents be adverted to, it will be found that they are in favour of the practice of conducting and signing proceedings in the name of the Attorney-General by other counsel. This practice has been sustained, with reference to Mr. Primrose himself, by the Court of King's Bench at Quebec, in the cases of

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the Queen *v.* Bonner, and the Queen *v.* Petry, and also in the District Court of Quebec. We believe that it may be said that the practice never has been shaken, and has been and is general. With reference to the course which obtains in England, we know that in some proceedings under the excise laws at the instance of the Crown, the Solicitor of the Treasury is the prosecuting officer, and his printed name at the foot of process has been held sufficient.

We are therefore humbly of opinion that the Attorney-General may, in his discretion, empower the Queen's counsel to conduct the Crown suits and prosecutions in his name, by giving them special instructions in particular cases, or in cases of emergency or requiring celerity and despatch, by adopting and confirming acts done under a general authority to defend the interests of the Crown when liable to be prejudiced.

All which is most respectfully submitted by your Excellency's, &c.

L. H. LAFONTAINE, Attorney-General, L. C.

ROBT. BALDWIN, Attorney-General, U. C.

T. C. AYLWIN, Solicitor-General, L. C.

JAS. E. SMALL, Solicitor-General, U. C.

KINGSTON, 16th January, 1843.

26th August, 1842.

ROBERT AND ANNE—RICHMOND.

Seamen while acting in the line of their strict duty, cannot entitle themselves to salvage. But extraordinary events may occur, in which their connexion with the ship may be dissolved *de facto*, or by operation of law, or they may exceed their proper duty, in which cases they may be permitted to claim as salvors.

ROBERT AND
ANNE.

JUDGMENT.—*Hon. Henry Black.*

The ship Robert and Anne sailed on a voyage from London to Quebec, on the 24th of April last, and in coming up the river St. Lawrence struck on a reef at or near Matane, about two hundred miles below Quebec. The master believing her to be a total wreck abandoned her, coming on shore in his boat with part of his crew, and proceeding to Quebec by land to make the usual protest, which he did. The chief mate and the rest of the crew remained on board, and by their exertions the vessel was got off, with no very great damage, and came to Quebec (a), where the crew who had signed articles for a voyage to Quebec and back to Great Britain, instituted proceedings in this court as salvors claiming salvage. But, as their connexion with the vessel does not appear to have been dissolved *de facto*, or by operation of law, and as, in my opinion, they have not exceeded the duty which devolved upon them, under their articles, to labour in the preservation of the vessel and cargo, out of which they were to be paid their wages, they are not entitled to be considered as salvors, and the suit must be dismissed.

It appears to me that the seamen, including the pro-

(a) Sailed on her return voyage on the 29th August of the same year.

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moter, ought to be allowed their wages up to the termination of the voyage, and that the stranding of the ship in the St. Lawrence, and her recovery and arrival at Quebec by the exertions of the crew, do not present a case entitling them to any extraordinary extra-compensation by way of salvage, as for any hazardous and meritorious services. The seamen did their duty and stuck to the ship, and got her off the rocks, and brought her to port, and their wages justly continued until the voyage ended. But there was nothing extraordinary in the case, and of so perilous a nature as to entitle them to compensation beyond their contract. If the ship had not been recovered, but had perished on the rocks where she was stranded, notwithstanding all the faithful and strenuous efforts of the crew, and there had been property saved, then the crew might possibly have had an equitable claim, which would have been felt by a Court of Admiralty, for compensation out of the property saved, for their particular services. But here the continuance of their wages up to the arrival of the ship at her port of destination is, I should apprehend, sufficient for the occasion, and to that extent I think they ought to be allowed, on the ground that the voyage did not end, nor were they discharged from their contract previously. I do not perceive the policy or the authority in the marine law, that would allow the seamen a further reward in the nature of salvage; for the case does not strike me, under the circumstances, as coming within the exception to the ordinary principles of the maritime law on the subject of salvage (b).

Gairdner and Stuart, for the seamen.

Duval, for the ship.

(b) This very important legal question was fully and carefully discussed before the High Court of Admiralty of England, on the

14th May, 1852, in the case of the *Florence* (16 Jurist, 572), wherein the crew were rewarded as salvors. Dr. Lushington, justly

distinguished for his eminence as an Admiralty judge, commenced his judgment in that case as follows: "I conceive the question to be this, whether when a merchant ship is abandoned at sea, *sine spe revertendi aut recuperandi*, in consequence of damage received and the state of the elements, such abandonment taking place *bond fide* and by order of the master, for the purpose of saving life, the contract entered into by the mariners is by such circumstances entirely put an end to; or whether it is merely interrupted, and capable by the occurrence of any and what circumstances, of being again called into force. I think all the circumstances I have stated are indispensable to the just framing of the proposition. First, the abandonment must take place at sea, and not upon a coast, for if a ship be driven upon a coast and become a wreck, and the mariners escape to the shore, the contract enures to this extent at least, that if they act as salvors, and successfully, so as to save

enough to pay their wages, they will be entitled to them though not to salvage; if they do not so exert themselves, their wages are lost.—The Neptune, 1 Hagg. 227. Secondly, the abandonment must be *sine spe revertendi*; for no one would contend that a temporary abandonment, such as frequently occurs in collisions, from immediate fear, before the state of the ship is known, would vacate the contract. Thirdly, the abandonment must be *bond fide* for the purpose of saving life. Fourthly, it must be by order of the master, in consequence of danger by reason of damage to the ship and the state of the elements."

In the case of the barque Flora, Wilson (27 Oct. 1832), Judge Kerr allowed salvage to the chief and second mates and carpenter, for their meritorious services, equal to one-third of the gross proceeds arising from the sale of the articles saved from the wreck.—See Nautical Magazine for February 1833, Vol. 2, No. 12, p. 87.

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Tuesday, 21st April, 1846.

JANE—CUSTANCE.

JANE.

In cases arising out of the abrupt termination of the navigation of the *St. Lawrence* by ice and a succession of storms, in the end of November, seamen shipped in England, on a voyage to Quebec and back to a port of discharge in the United Kingdom, entitled to have provision made for their subsistence during the winter, or their transportation to an open seaport on the Atlantic, with the payment of wages up to their arrival at such port.

The master is not at liberty to discharge the crew in a foreign port without their consent; and if he do, the maritime law gives the seamen entire wages for the voyage, with the expenses of return.

Circumstances, as a *semi-naufragium*, will vest in him an authority to do so, upon proper conditions; as by providing and paying for their return passage, and their wages up to the time of their arrival at home.

It is for the Court to consider what would be most just and reasonable; as whether wages are to be continued till the arrival of the seamen in England, or to the nearest open commercial port, say Boston, or until the opening of the navigation of the *St. Lawrence*.

Under the peculiar circumstance of this case, wages decreed, including the expense of board and lodging, until the opening of the navigation of the *St. Lawrence*.

When receipts and discharges of claims are given by the crew of a vessel they are not to be taken in the Admiralty as conclusive; and where settlements and receipts are made under undue and oppressive influence, and without free consent, they do not bar an equitable claim for compensation beyond what the crew have received.

JUDGMENT—*Hon. Henry Black.*

The present is one of the many cases arising out of the abrupt termination of the navigation of the *St. Lawrence* by ice and a succession of storms, in the end of November last, and which proved so disastrous to those ships which from necessity or other cause, were detained in the port of Quebec beyond the usual time

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indicated, by the average of seasons, as the prudent period of departure. The promoters were shipped at Falmouth, in England, on a voyage from that port to Quebec, and back to a port of discharge in the United Kingdom, at £2 10s. sterling, per month. The Jane sailed from Quebec on the 28th November, on her return voyage, but having encountered foul winds and boisterous weather about the 1st of December, below the Brandy Ports, she was obliged to be run ashore, in order to avoid total shipwreck from the immense and sudden accumulation of drift ice in the river; she was stranded at high water at St André, on a muddy bottom, and put into a place of safety for the winter, about 100 miles below Quebec. On the 16th December, the master, (having returned from Quebec,) informed the crew that the vessel had been condemned; and after various overtures to the men prevailed upon them to accept their discharge with wages up to that period, which were paid—ten shillings currency in cash—and the balance by drafts on the agent at Quebec, giving receipts in full of all further demands, but without any tender of indemnity, or the means of travelling to an open Atlantic port. They were afterwards, at the expense of the ship, brought to Quebec, where they again signed receipts in full of all further claims and demands. The libel alleges a tortious discharge procured by false and fraudulent representations; and that no provision had been made for their subsistence during the winter, or their transportation to an open sea-port on the Atlantic, with the payment of wages up to their arrival at such port; and claims wages up to the 1st June next, with the cost of their board during that period. The defence rests upon the right of the master under the circumstances to discharge the crew, and the fact of their having executed receipts, in full satisfaction of their claims, and releasing the master, ship and owners from all further liability.

Two questions have been presented at the argument

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for the deliberation of the Court, and I have come to a conclusion.

1. That the receipts and discharges of claims by the crew of the vessel given in December last, are not a bar to their further claim for compensation. The receipts are good evidence of the money received, and for which they are to be charged, but no further. It appears to me from the testimony of Blouin the pilot, and of two of the messmates, that the settlement and receipts were made under undue and oppressive influence, and without free consent. The information upon which the coercion was founded was not true; at least there is no evidence that the vessel was regularly condemned, and for aught that appears, the information may have been false. Mariners, in the view of Admiralty law, are *inopes consilii*, and are under the special protection of the Court, in like manner as minors and weak persons are entitled to have the guardianship of a Court of Chancery thrown over them. They are treated as wards of the Admiralty. The observation of Lord *Stowell* in the case of the *Juliana* (a), and of Judge *Story* in *Harden v. Gordon* (b), as well as of Judge *Ware* in the case of the *David Pratt* (c), show in a strong light the jealousy and vigilance, and parental care of the Admiralty, in respect to hard dealings, under forbidden aspects, with the wages of seamen. I think that in the spirit and policy of the cases, the discharges and receipts in full, almost I may say extorted from the seamen, ought not to bar an equitable claim for compensation beyond what the promoters have received.

2. The amount of the compensation is another, and perhaps a more unsettled question. The decision of Lord *Stowell* in the case of the *Elizabeth* (d), comes nearer to the case before us than anything I have seen. It is there

(a) 2 Dodson, 504.

(b) 2 Mason, 561.

(c) Ware, 495.

(d) 2 Dodson, 403.

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said that though the master be not at liberty to discharge his crew in a foreign port without their consent (and if he does, the maritime law gives the seamen entire wages for the voyage with the expenses of return), yet that circumstances—as a *semi-naufragium*—where repairs may be doubtful or very dilatory, might vest in him an authority to do so, *upon proper conditions*, as by providing and paying for their return passage, and their wages up to the time of their arrival at home. I think the present case would warrant the adoption of this rule; and yet there is a latitudinary discretion resting in the Admiralty Judge—and must be under the special circumstances—and I apprehend he may consider what would be most just and reasonable; as, whether the wages were to be continued to the arrival of the seamen in England, or to the nearest open American commercial port, say Boston, or until the opening of the navigation of the St. Lawrence. One or the other of the alternatives, I think I must adopt, and from a local knowledge and view of the circumstances of this case, as they appear before me, I award wages, including the expense of board and lodging until the opening of the navigation of the St. Lawrence (e).

*Alley*n, for promoters.

Duval, Q. C., for respondents.

(e) The Factor, MSS. Reports of the Vice-Admiralty Court at Quebec, 16th June, 1836.

Tuesday, 16th November, 1847.

LADY SEATON—SPENCER.

LADY SEATON. General Merchant Seamen's Act (7 & 8 Vict. c. 112, s. 2). Articles not signed by the master, as required by the General Merchant Seamen's Act, cannot be enforced.

This was a proceeding on the part of William Hodgson, to recover a sum of money due to him for wages earned on a voyage from the port of London to Quebec. The demand was objected to on the ground that he had entered into an agreement with the master on the 1st of September last, to proceed on a voyage from London to Quebec and Montreal and "back to a port of discharge in Great Britain." It was urged, on the other hand, that the mariner's contract was irregular, because it had not been signed by the master as required by the Merchant Seamen's Act. The magistrate, before whom the complaint on behalf of the seaman was made under the authority of that Act, referred the case to be adjudged by this Court, and the following judgment was this day pronounced:

JUDGMENT.—*Hon. Henry Black.*

I am called upon in this case to enforce indirectly,—by refusing to the promoter wages for the services rendered by him to the ship,—his executory contract to Great Britain, as the ultimate port of discharge in the articles which have been produced, those articles not being signed by the master. The law respecting the reducing to writing in shipping articles the agreement between the seamen and the master is but a part of the law, as well common as statute, which relates to this important object, and to form a right adjudication upon any branch of it, it

is necessary to have in mind the whole scope and policy LADY SEATON.
of the one and the other law upon that head. Without touching upon this branch of law further than is necessary for the question immediately under consideration, it is to be observed that one of the ends and objects of that law is to ascertain with certainty,—for the protection of a class of persons who, from their habits of carelessness and over-confidence, are often over-reached,—the contract into which they enter, both as to the amount of remuneration that they are to receive, the description of the service, and the penalties to which they render themselves liable by any dereliction of the duties which are imposed upon them. The ship's articles, and the signing of them by the seamen, are therefore of importance, as settling the terms of the contract, and rendering present to the mind of the seaman, as a conventional obligation upon him,—with the binding force of which he is better acquainted than that of statutes which he does not read,—the necessity of obedience to the master, and of the faithful discharge of his duty; adding at once a promise to perform it, and an agreement to suffer all the penalties which the law imposes in case of failure. To attain this end, the legislature has prescribed a certain form of articles; they have conferred upon the master, upon his observing these forms, summary and extraordinary means of enforcing this contract, otherwise a simple contract *locati conducti*; and they have, on the other hand, subjected him to pecuniary penalties for taking into the service of the ship a seaman without executing regular articles. This contract stands not then upon the footing of an ordinary contract *locati conducti*. The provisions just adverted to are provisions of a great maritime power, in the discipline and order of whose seamen is to be found not only the foundation of its merchant navy, but also that of its national navy.

With an object in view of such high importance, and to

LADY SEATON. use the words of the preamble of the statute, to promote the increase of the number of such seamen, and to afford them all due encouragement and protection, on a large, constant, and ready supply of whom the prosperity, strength, and safety of the United Kingdom and of Her Majesty's dominions do greatly depend, it is enacted, "That it shall not be lawful for any master of any ship of whatever tonnage or description belonging to any subject of Her Majesty, proceeding to parts beyond the seas, or of any British registered ship of the burden of eighty tons or upwards, employed in any of the fisheries of the United Kingdom, or in proceeding coastwise, or otherwise, from one part of the United Kingdom to another, to carry to sea any seaman as one of his crew or complement (apprentices excepted), unless the master of such ship shall have first made and entered into an agreement in writing with such seaman, specifying what wages such seaman is to be paid, the quantity of provisions he is to receive, the capacity in which he is to act or serve, and the nature of the voyage in which the ship is to be employed, so that such seaman may have some means of judging of the period for which he is likely to be engaged; and that such agreement shall be properly dated, *and shall be signed by such master in the first instance*, and by the seamen respectively at the port or place where they shall be shipped; and that the signature of each of the parties thereto shall be duly attested by one witness at the least, and that the master shall cause the agreement to be read over and explained to every such seaman in the presence of such witness, before such seaman shall execute the same" (a). The statute confers summary remedies in various cases for enforcing this contract against the seamen, and subjects the master to a penalty of 10*l.* for every seaman he shall carry out to sea with-

(a) 7 & 8 Vict. c. 112, s. 2.

out having entered into the agreement required by the statute (b). The signing is not a mere *solemnitas juris*, but it has substantially this effect, that it is evidence against and binds the master personally, whether he goes with the ship or not. In an action for the penalty under the last-mentioned clause of the statute, it is apprehended that it would be no defence to such an action for the master to show, as the articles required by the statute, articles which were not signed by him. The form in which instruments of this nature are to be executed having been directed by the statute, it is not easy to believe that in settling this form such a condition should have been required without consideration; it is one of the provisions taken from Sir James Graham's Act (c) not found in the previous statutes in this matter (d); and an additional reason is here afforded that this provision is not without an object.

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The statute thus requiring ship's articles to be signed by the master, and the articles in question in this cause not being so signed, the master has voluntarily put himself out of the provisions of the statute law on this head, and it is impossible for the Court to afford him any aid in enforcing a contract which he has not invested with the forms which the law requires. If the Court were to enforce this contract it would indirectly enforce the carrying of the promoter to sea, without the ship's articles required by the statute, and be aiding the master in contravening the statute. Now, it seems to be a good general rule, that wherever a contract has for its basis the performance or omission of some act, the doing or omitting of which would contravene the provisions of the statute law, the agreement is invalid, no less than it would be where in any similar case the provisions of the

(b) 7 & 8 Vict. c. 112, s. 4.

e. 73; The Baltic Merchant,

(c) 5 & 6 Will. 4, c. 19, s. 2.

Edwards's Rep. 87.

(d) 2 Geo. 2, c. 36; 37 Geo. 3,

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common law might be infringed by the agreement made (c).

The suit is for wages earned for services up to the arrival of the ship at this port, the defence is a subsisting contract, and the evidence offered of this contract is an instrument not possessing the characters which the law requires for such a contract.—Under these circumstances the Court has but one duty to perform, which is to award the amount of the wages for the services actually rendered to the ship. It has no power to enforce indirectly and prospectively a contract entered into without receiving its proper completion, by the fulfilment of the forms and conditions which the law, from high motives of policy and justice, has required for contracts of this nature.

Dunbar Ross, for seaman.

John Maguire, for ship.

(c) Lord Holt, in *Bartlett v. Vinor*, Carth. 252; Lord Tenterden, in *Wetherell v. Jones*, 3 B. & Adol. 226; and Lord Kaimes's *Principles of Equity*, Book i., Part i., p. 63.

1st August, 1848.

JOHN MUNN—RICHARDSON.

If it be practicable for a vessel which is following close upon the track of another to pursue a course which is safe, and she adopts one which is perilous, then if mischief ensue she is answerable for all consequences.

JOHN MUNN.

JUDGMENT.—*Hon. Henry Black.*

This was a case of racing between two of the large passenger steamers plying on the St. Lawrence, between Quebec and Montreal. The Lord Sydenham, on the twenty-fourth of May last, at the usual hour advertised for her departure, left her berth at the wharf in the harbour of Quebec, at which she had been lying with her head down the stream, and taking a sweep round towards the Point Levi Shore, so as to get her head up the stream, returned into the usual course on the north side of the river. A few minutes after the Lord Sydenham started, the John Munn, a swifter steamer, which had been lying with her head up the stream, at a wharf above that from which the Lord Sydenham started, also got under weigh and proceeded up the river on the north side. The superior speed of the John Munn brought her nearly up to the Lord Sydenham at the time when that vessel was nearly abreast of the brig Henry—then lying at anchor to the southward of both vessels in that part of the river known as the ballast ground—when the John Munn, in trying to pass the Lord Sydenham, and between her and the brig, ran into the latter, doing the damage for which this action is brought by the owners of the brig against the John Munn. An immense mass of evidence has been adduced in the action, and as is usual in such case, the statements of the witnesses are very conflicting.

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The brig being at anchor, and no blame being imputed to her, the contest came virtually to be, which of the two steamers was responsible for the damage done to the brig. In a case of this kind the rule of law is, that if it be practicable for a vessel which is following close upon the track of another, to pursue a course which is safe, and she adopts one which is perilous, then if mischief ensue she is answerable for all consequences (*a*). The Court has the good fortune upon this occasion to be assisted by Captain Edward Boxer, R. N. C. B., one of the most experienced and able seamen in the British service, whose skill and knowledge can be best appreciated by those of his own profession (*b*). He has listened with great patience and attention to the arguments of the counsel, and has carefully examined all the evidence in the case, and his opinion is decidedly against the conduct of the John Munn, an opinion which the Court cannot have a moment's doubt in adopting; and I pronounce accordingly.

(The amount of the damage was subsequently established at the sum of 304*l.* 4*s.* 2*d.* currency, by the Registrar and merchants to whom the usual reference was made (*c*).)

Andrew Stuart, for the brig.

Dunbar Ross, for the John Munn.

(*a*) Lord Ellenborough, in *Mayhew v. Boyce*, 1 Starkie's Rep. 425.

(*b*) Subsequently Rear-Admiral Boxer, who died at Balaclava during the Crimean campaign.

(*c*) It is the duty of every vessel seeing another at anchor, whether in a proper or improper place, and whether properly or improperly anchored, to avoid, if

practicable and consistent with her own safety, any collision. *The Batavier*, 4 Notes of Cases, 356, and 2 W. Rob. 407.

Where a vessel at anchor is run down by another, the *onus* lies on the latter to prove the collision arose from some cause which would exempt her from liability. *Ibid*.

Tuesday, 19th September, 1848.

MARY JANE—TRESCOWTHICK.

Persons furnishing supplies to ships in this country, technically called material men, have not a lien upon the ship for the amount of their supplies; and the Court has no jurisdiction to enforce demands of this nature.

MARY JANE.

In this case an action was entered against the Mary Jane, a schooner built and registered within the port of Quebec, for the value of materials and work supplied to her by John Armstrong.

The libel shortly pleaded that this person was engaged on or about the 29th of June last by Jonathan Trescowthick, the owner and master, to furnish all the iron work necessary for the fitting out and rigging of the vessel, and rendering her seaworthy, without which she could not proceed to sea; that he was employed on board of her in furnishing this iron work from the 29th of June to the 9th of the present month of September, during which time the schooner was in the harbour of Quebec, within the District of Quebec; and that the amount due for the necessaries in question was 49%. That the schooner was "a sea-going vessel," and that the owner refused to pay.

On the part of the owner the jurisdiction of the Court to entertain the suit was denied, and upon this ground the admission of the libel was objected to.

JUDGMENT.—*Hon. Henry Black.*

The question which this case brings under the consideration of the Court is, whether persons furnishing supplies to ships in this country,—technically called material men,—have a lien upon the ship for the amount of those supplies; and if so, whether the Court has juris-

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diction to enforce such lien. The word lien is used from the want of any other word in the English language to express the exact nature of the right claimed. When used in relation to material men, as in the question above stated, it has an import different from the ordinary import. Lien, in the common acceptation of the term in the English law, implies an actual possession in the holder of it, of the subject upon which it is claimed. There is no doubt that in this sense of the word ship-builders, like other tradesmen in possession of the subject upon which their labour has been employed, have a lien upon the subject for the price of their labour, so long as they retain the possession (a). But the lien here claimed is entirely apart from the possession; it is rather a right to proceed against the vessel, and to be paid out of the proceeds, in preference to all other creditors, and being strictly the *hypotheca* of moveables, allowed by the civil law, may, to avoid confusion, be conveniently denominated hypothecary lien.

The hypothec of moveables is, it is believed, unknown in the English municipal or common law; and in the civil and maritime law of England is confined within a small number of cases, such as seamen's wages, and special hypothecation. It is true that by the general maritime law of Europe and America, an hypothecary lien is given for repairs done and materials furnished to other than domestic ships (b), and in many countries for repairs and supplies to domestic ships also (c); and this hypothecary lien follows the ship into the hands of a *bond fide* purchaser without notice (d). There are considerations of

(a) The *Vibilia*, 1 Robinson, p. 6; The *Harmonie*, Ibid. p. 178.

(b) The *General Smith*, 4 Wheat. p. 438; *St. Jago de Cuba*, 9 Wheat. p. 409.

(c) Valin sur l'Art. 16, tit. 14,

liv. 1er. de l'Ord de la Marine; Boulay Paty, Cours de Droit Coml. tom. i. pp. 110, 124; Abbott on Shipping, p. 149, 7th edit.

(d) *Madona d'Idra*, Dodson, p. 40.

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convenience and public policy applicable as well to the one rule as to the other. The rule of continental Europe and of America has a strong show of equity in its favour; the labour and materials of the material man are incorporated with the ship, and the owner being allowed to profit by this augmentation in the value of his ship, without paying for it, seems to contravene the rule that *nemo debet locupletari aliena jactura*. So, it would seem greatly to facilitate navigation by enabling the master or the owner, at all times, and in all places, to command for the purposes of his voyage a credit equal to the value of the ship. The policy of the English law seems to lie deeper. It has been quaintly but truly said, that "ships were made to plough the ocean, not to rot in port." The allowing of hypothecary liens upon moveables is repugnant to commercial policy, and eminently so would be the allowance of such lien upon ships, as subjecting them to unnecessary detention, and diminishing the security of titles to them. If the material man be unwilling to make repairs to the ship at the port to which she belongs, upon the credit of the owner, he may obtain from him a special hypothecation of the ship, for this as for any other debt. If the master should require repairs to be made in the progress of his voyage in a port abroad,—and there be a necessity of the hypothecation of the ship for the making of such repairs,—he too may hypothecate the ship (*e*). The maritime law of England then in refusing a tacit hypothecary lien, and in allowing and enforcing a special hypothecation of the ship,—made by the owner under any circumstances, or by the master in the progress of the voyage in case of necessity,—equally provides for the ship's ploughing the ocean and for her not rotting in port.

(*e*) The *Gratitudine*, 3 Rob. 2 Peere Williams, 367; Benzen Ad. Rep. 240; Sir Joseph Jekyll, v. Jeffries, 1 Lord Raym. 152; in *Watkinson v. Bernadiston*, Johnson v. Shippen, Salk. 35.

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But whatever may be the reason of the one or the other rule, the Court is bound to enforce and carry into effect the law as it stands.

The commissions to the Judges of the Vice-Admiralty Courts in the British possessions abroad, empower them to hear and determine causes "according to the civil and maritime law of the High Court of Admiralty of England." The terms of the commissions were settled at a very old date, they are very general, but necessarily controlled by the above cited words, introduced with a view to one uniform system for the guidance of the Courts of Admiralty in every part of the British possessions.

The inquiry thus narrows itself down to the question, what in relation to material men is the civil and maritime law of England? Now, a long course of uniform decisions in the English Courts, from the time of Charles the Second down to the case of the *Neptune* in 1835 (*f*), has established the principle that no hypothecary lien exists for work done or materials furnished to ships in England. Where an attempt similar to the present was made by a person who had repaired a ship, to claim a lien on the proceeds of her sale, Lord *Hardwicke* states it as one of the questions in the cause, whether the money arising from the sale should be answerable to the plaintiff; and then after laying down the rule that the ship itself would not be liable, he proceeds to say: "If therefore the body of the ship be not liable or hypothecated, how can the money arising by sale be affected or followed, the one being consequential of the other (*g*)?" In the latest case upon this subject,—that of the *Neptune*,—the judicial committee of the Privy Council, upon an appeal from the High Court of Admiralty of England, expressly denied that material men ever had, by the English maritime law, in respect of such contracts, any lien upon the ship, or

(*f*) 3 Knapp's Cases in the Privy Council, p. 94.

(*g*) *Ex parte Shank*, 1 Atk. 234.

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any preference over other simple contract creditors on the proceeds. The same rule obtains in Scotland, the municipal law of which country like our own, in Lower Canada, recognises hypothecary liens. In the case of *Wood v. Hamilton*, the House of Lords, on the 15th June, 1789, upon an appeal from the Scotch Courts, affirmed a judgment against this claim, although such claims had been frequently allowed in the Courts of Scotland during a period of four-score years preceding (*h*). Then, as to repairs made abroad, in the course of the voyage, the hypothecation must be express, whether made by the owner or by the master (*i*). In the numerous cases in which repairs have been made, or materials furnished by orders of the master abroad,—and in which attempts have been made to enforce the claim of the material man against the ship,—the hypothecation has been express; and the question has generally turned upon the necessity, which alone could authorise the master to hypothecate the ship. No tacit hypothecation of the ship has ever been recognised in the High Court of Admiralty (*k*); and in the case of the *Neptune*, already adverted to, in which a privilege, over the proceeds of the ship in the registry, was asserted by the High Court of Admiralty, the judgment was, after much consideration, reversed by the Judicial Committee of the Privy Council.

I will shortly advert to another point that has been pressed upon the Court in the argument of the Counsel for the promoter. It has been contended that the sixth section of the Act 3 & 4 Vict. c. 65, confers upon the Court an authority which it did not previously possess in such matters. The words of this section are these:—“The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature

(*h*) Abbott on Shipping, p. 147,
7th edition by Shee.

(*i*) *Justin v. Ballam*, Salk. 34.

(*k*) See judgment of Sir Christopher Robinson, in the case of
The Maitland, 2 Haggard, p. 254.

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of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessities supplied to any FOREIGN ship or sea-going vessel; and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered, or damage received, or necessities furnished, in respect of which such claim is made." Without being disposed to narrow the interpretation of a statute in cases where the exigence or convenience of commerce calls for an extended latitude of construction, I think it can scarcely admit of doubt that a vessel built and registered in a British possession is not a foreign sea-going vessel within the provisions of this statute. It was so decided by the High Court of Admiralty in a case, under the same statute, against a vessel built and registered in the Province of New Brunswick. The learned Judge, Doctor *Lushington*, in delivering his judgment in that case, said: "If the section in question were intended to give the Court a jurisdiction with respect to necessities furnished to 'any sea-going vessel,' there would be no difficulty in the case, for this vessel is clearly a sea-going vessel. I must confess, however, I entertain a considerable difficulty in conceiving that the legislature ever intended to confer upon the Court so extensive and extraordinary a power." And again: "Looking at the decisions of the Courts of common law upon this subject, and at the great jealousy which has been universally manifested against the introduction of the general maritime law for the purpose of enforcing demands of this description, I cannot think that in the present case I should be warranted in adopting such a construction of the statute" (1).

I have not been able to ascertain what the practice may

(1) *The Ocean Queen*, 1 Robinson, p. 460.

have been in the Vice-Admiralty Courts in the old British Colonies, nor that which now obtains in the Vice-Admiralty Courts of the other dependencies of Great Britain. I am inclined to believe, however, that this claim of hypothecary lien was not enforced in the Vice-Admiralty Courts of the old Colonies. The subject has, since the declaration of American independence, undergone much discussion in the Courts of the United States, exercising Admiralty jurisdiction; and the claim has there been maintained for repairs made and necessities furnished to a foreign ship, or to a ship in the port of a State to which she does not belong. But in none of the arguments of counsel or judgments of the Courts in those cases, is there a trace to be found of the existence of such a principle of jurisprudence in the pre-existing Colonial Courts of Vice-Admiralty.

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If an hypothecation of the vessel could be shewn under the civil and maritime law and customs of the High Court of Admiralty of England, then this Court would be bound to enforce it; but I am of opinion that there has been no hypothecation whatever, and I must, therefore, reject the present libel (*m*).

Charles Alleyn, for material man.

H. S. Anderson, for owner.

(*m*) See a learned argument of Sir Leoline Jenkins, before the House of Lords, on the competency of material men to sue

originally in the Admiralty; Life of Sir Leoline Jenkins, Vol. 1, p. 76.

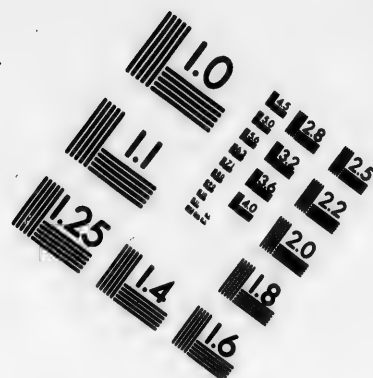
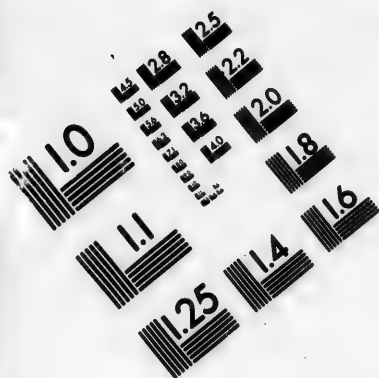
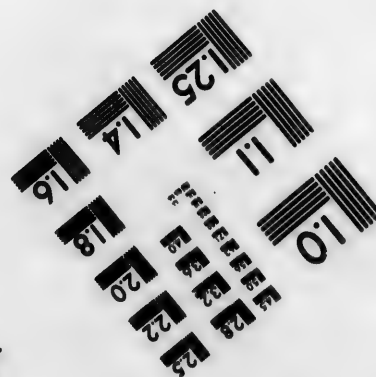
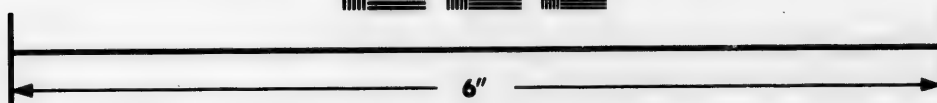
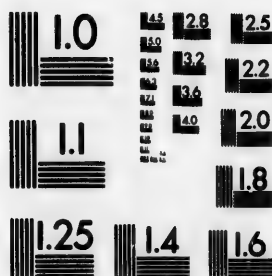


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26th June, 1849.

HERCYNNA—O'BRIEN.

HERCYNNA.

There seems to be no fixed limit to the duration of a maritime lien; but must be enforced within an equitable period, considering the nature of the lien and the changes of interest therein.

JUDGMENT.—*Hon. Henry Black.*

The promoter in this case piloted the ship *Hercynna*, from Quebec to Bic, on the 28th of May, 1848, for which service he was entitled to the sum of 16*l.* 2*s.* 6*d.*, sought to be recovered in this suit. On the 31st July, in the same year, he took from John Jeffery, then owner of the ship, a promissory note at three months for the above sum. The ship having returned to the port, the promoter on the sixth of October, in the same year, again piloted her down from Quebec to a place between the Brandy Pots and Bic Island, for which he was paid in money 16*l.* 2*s.* 6*d.* On the 6th November, the note, given for the first service, was protested for non-payment, and on the 23rd of January of this year, it was returned to Jeffery, the maker, by the promoter, who thereupon got back his receipt for the note. On the 18th of April last, the ship was sold by Jeffery, through his agent in Great Britain, to John Richard Broadbent, the present owner, without notice of the promoter's claim. The ship having again returned to Quebec, was on the second of the present month of June arrested on process out of this Court, for the pilotage earned in May, 1848; and for which the promoter claimed a lien on the ship under the maritime law. As between the owner, at the time of the service rendered, and the pilot, the claim might perhaps be a permanent lien on the vessel, but the fact of her having

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subsequently passed into the hands of a *bonâ fide* purchaser, for a valuable consideration, without notice, altogether alters the case. In respect to such a purchaser the lien must be enforced within a reasonable time after the debt became due and the credit expired, and the conduct of the person claiming the lien must be such as to make manifest as far as possible his intention to retain and enforce his lien. What will amount to such manifestation must depend upon the circumstances of the case, and is not susceptible of any definite general rule. In the present case, even admitting that the lien either subsisted while the note was running, or that it revived by the promoter's giving back the note, and receiving back his receipt for it; yet as he took no proceedings here against the owner, and did not follow the vessel home and sue for his claim there, and allowed her to be sold to an innocent purchaser, without making any effort to make the lien known, and more especially as he himself had piloted the vessel down the river on her second voyage, after the lien accrued, and while it was conditionally discharged, and had received in cash his pilotage on the second occasion; from which a third might have fairly inferred that he had no claim upon the vessel; I am of opinion that as against the *bonâ fide* purchaser, change of ownership, without notice, extinguished the lien, which as regarded the new owner may be considered as stale and inequitable. One of two innocent persons must suffer in this case, and it is more equitable that he who could have prevented this, and did not choose to do so, should be the sufferer, rather than he who had no means of preventing it (a).

Casault and Langlois, for the pilot.

Lelièvre and Angers, for the ship.

(a) Ordonnance de la Marine, tom. 1, p. 602.
Liv. 2, Tit. 10, art. 2; Valin, A maritime lien does not in-

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clude or require possession. The word is used in maritime law not in the strict legal sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither pre-suppose nor originate in possession. This was well understood in the civil law, by which there might be a pledge with possession and an hypothecation without possession, and by which in either case the right travelled with the thing into whosoever possession it came.

Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story (1 Sumner, 78) explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon

the thing to be carried into effect by legal process. This claim or privilege travels with the thing, into whatever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached. This simple rule, which, in our opinion, must govern this case, and which is deduced from the civil law, cannot be better illustrated than by reference to the circumstances of *The Aline* (1 W. Rob. 154), referred to in the argument, and decided in conformity with this rule, though apparently upon other grounds. In that case, there was a bottomry bond before and after the collision, and the Court held, that the claim for damage in a proceeding *in rem* must be preferred to the first bondholder, but was not entitled against the second bondholder to the increased value of the vessel by reason of repairs effected at his cost. The interest of the first bondholder taking effect from the period when the lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim. So by the collision the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting

for all parties, and he would be bound by that transaction.

This rule, which is simple and intelligible, is, in our opinion, applicable to all cases. It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay when the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced, into

whosoever possession the thing may come.

Sir John Jervis, Lord Chief Justice of the Common Pleas, in delivering the judgment of the Judicial Committee of the Privy Council in *Harmer v. Bell* (The Bold Buccleugh), on the 24th April, 1852, 7 Moore's P. C. Reports, 284-5.

See also opinion of Dr. Lushington in The Bold Buccleugh, 3 W. Rob. 220.

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30th March, 1850.

BY-TOWN—HUMPHREY.

By-Town.

In a cause of collision between two steam vessels, the Court, assisted by a captain in the Royal Navy, pronounced for damages and costs, holding that the one which crossed the course of the other was to blame.

JUDGMENT.—*Hon. Henry Black.*

This is a case of collision. The action is brought by the owner of the steamer John Munn, against the steamer By-Town, for damage done to the John Munn by the By-Town, in the night of the twenty-first of June last, while the former was pursuing her ordinary course to Quebec, and the latter was proceeding upwards towards Nicolet. When nearly abreast of the river Champlain, the John Munn being in the usual channel and running down the stream, the By-Town, about an hour after midnight, crossed the river taking a course in a diagonal direction towards the north shore, and in so doing came across the course of the John Munn, and struck her on the starboard side doing the damage complained of, which is considerable. Captain Boxer, R. N. C. B., who has attended the Court as an assessor, having heard the whole of the arguments of the counsel and read the evidence, has given in writing an opinion to the following effect.

“I am decidedly of opinion that the case is clearly made out against the By-Town; and in coming to this conclusion I am particularly guided by the statements of

the witnesses examined for that vessel, which in my opinion clearly show, that if proper care had been taken by the master of the By-Town, no collision would have taken place. The pilot of the By-Town says, he expected to meet the John Munn, and that when he saw her she was about three miles off; that he then altered his course to the southward, steering diagonally towards the John Munn. Now, as there was no necessity for doing so, the By-Town being evidently on the wrong side and able with safety to keep her course straight up the river—at least until she had passed the John Munn—or to stop her engine when she neared that vessel, so as to allow the John Munn to pass her—the pilot of the By-Town would have acted with prudence if he had adopted one or the other of these courses, and would have thereby avoided the collision, as the John Munn was steering straight down the river. It is also proved by one of the seamen of the By-Town, that her pilot was asleep immediately or a short time before the collision; and it is proved by the fireman of the By-Town that the engineer was in bed and he believes asleep, when the pilot called out “stop her.” It was the duty of the master of the By-Town in so narrow and dangerous a channel, and while expecting to meet the John Munn, a steamer of great speed and size, to have been at his post, and to have seen that both the pilot and engineer were at theirs, and ready to act as circumstances might require for the mutual safety of the vessels, which he evidently neglected. He might also have hauled to the northward, and could have done so with safety before he saw the John Munn, and the vessels would then, no doubt, have passed each other safely on the proper sides. It is evident also that the By-Town did not display the lights required by the Trinity House regulations.”

With so decided an opinion from such undoubted

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authority as Captain Boxer, the Court, if it entertained any doubt, which it does not, could not hesitate in pronouncing against the By-Town (a).

Stuart and Vannorous, for the John Munn.

Holt and Irvine, for the By-Town.

(a) An allegation exceptive to the testimony of one of the witnesses in the cause pleaded, "That the witness doth not believe in the being of a God, and a future state of rewards and punishments; and as professing such principles is commonly accounted and taken to be by those who know him." His evidence was suppressed by consent of parties, on 15th March, 1850.

Friday, 19th April, 1850.

ISABELLA—DIXON.

Three of the promoters shipped on a voyage from Milford to Quebec and back to London, the eight remaining promoters shipped at Quebec on the return voyage; and all had signed articles accordingly. The ship came in ballast to Quebec, and after taking in a cargo sailed from Quebec on the return voyage, and was wrecked in the River St. Lawrence, and abandoned by the master as a total loss. *Held.* 1. That the seamen who shipped at Milford were entitled to wages for services on the outward voyage from Milford to Quebec, and one half the period that the vessel remained at Quebec, notwithstanding that the outward voyage was made in ballast. 2. That the seamen who shipped at Quebec, having abandoned, were not entitled to claim wages. 3. In cases of wreck the claim of the seamen upon the parts saved is a claim for salvage, and the *quantum* regulated by the amount which would have been due for wages.

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This was an action brought for the recovery of wages due to three of the promoters on a voyage from Milford to Quebec, and by the eight remaining promoters for wages on the return voyage from Quebec to London, interrupted by the stranding and abandonment of the vessel in the River St. Lawrence in the month of December last, a few days after her sailing from the port of Quebec. The vessel sailed from Milford on the 17th of September, on a voyage to Quebec, and thence back to London, and the seamen signed articles accordingly. She arrived at Quebec, in ballast, about the 9th of November, and after taking in a cargo, and remaining at the port of Quebec about fifteen days, sailed on her return voyage on the 24th of the same month. In consequence of some misunderstanding between the master and the crew, the vessel put back to Quebec, and sailed again on the 5th of December. On her voyage down the

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St. Lawrence she was overtaken by a storm, as she was lying off Cacona, at anchor, of such violence as to part her anchors, and oblige the master to run her ashore in Cacona Bay, where she remained until the 14th, and then drifted away with the ice. The vessel continued to drift until she struck on Apple Island, in the River St. Lawrence, at which place she was moored with a hawser chain and a tow line, under the directions of the mate. The master and nine of the crew had left her in the jolly boat and pinnace, while lying in Cacona Bay, and the rest of the hands came off in the long-boat from Apple Island. The vessel broke from her moorings on the 23rd of December, knocked her bottom out, drove up inside of Green Island, and became a complete wreck; and some days after she again drifted from Green Island and grounded on Basque Island.

The objections taken to the claim of the promoters, were, 1st. That no wages were due on the outward voyage from Milford to Quebec, because the vessel coming in ballast earned no freight; 2ndly. That the vessel was wrecked in the River St. Lawrence, on her return voyage, and abandoned by the master as a total loss.

JUDGMENT.—*Hon. Henry Black.*

The claim of the seamen of wages for their services on the outward voyage from Milford to Quebec, is not, in my opinion, affected by the vessel's sailing in ballast. The vessel arriving in safety at the port of destination of the outward voyage, wages accrued to the seamen for the whole period of that voyage, and one-half of the period that the vessel remained in this port (*a*), notwithstanding that the outward voyage was made by the ship in ballast (*b*). The act of the owners in sending the ship out without a

(*a*) Per Holt, C. J., apud Lord Raym. 739.

(*b*) The Two Catherines, 2 Mason's Rep. 328.

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cargo, or in ballast, cannot affect the right of the seamen to remuneration for their services, under the contract of hiring. The services of the seamen entitled them to their wages for that portion of the voyage which they had completed. Quebec was to the ship a port of destination, which in this respect is the same as a port of delivery (*c*). The intermediate period between the arrival and departure on her voyage homeward, is apportioned by equal moieties, the one moiety of this time appertaining to the outward, and the other to the homeward voyage (*d*). The right of the seamen to the wages on the outward voyage could only be divested by some act of misconduct on their part, whereby they would, by law, incur a forfeiture of them, and none such is alleged or appears. Two English cases in the Common Law Courts (*e*) seem at first sight to militate against the claim of the promoters; but upon a close examination of these cases, it will be found that the Courts felt themselves bound, by the express terms of the agreements, to say that there was but one voyage; whereas the voyage in the present case, consisted of two parts, the outward and the homeward voyage; and no special agreement appears to consolidate them (*f*).

Upon the second objection, it is to be observed that the claim of the promoters is not for salvage, but for wages, and the question arises as to the effect of the abandonment of the ship by the master and crew, upon the claim, on the part of the crew, for wages accruing on the outward voyage. The storm which occasioned the wreck, appears to have been a very violent one, and there

(*c*) *Brown v. Benn*, 2 Lord Raym. 1247; 12 Mod. 409, 442; 1 Lord Raym. 639.

(*d*) *Holt, C. J.*, 12 Mod. 108; *Hooper v. Perley*, 11 Mass. Rep. 545; 1 Lord Raym. 739; *Viner*,

Tit. Mariners, 15, 236.

(*e*) *Hernaman v. Bawden*, 3 Burr. 1844; *Appleby v. Dods*, 8 East, 300.

(*f*) *The Juliana*, 2 Dodson, 504.

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is nothing to shew that all proper measures were not taken for the safety of the vessel, when the accident happened. I have it not in my power to form a judgment upon this point, from the evidence in the cause, nor does it seem necessary that I should, as it lay exclusively with the master to leave the vessel or not, as in his judgment seemed best. The promoters do not seem to have been guilty of any of the acts of misconduct which the law punishes by the forfeiture of wages; and the abandonment of the ship by the master had not, I think, the effect of divesting the mariners of their lien upon the ship, and whatever remained of the ship for their wages. The decision of Mr. Justice *Story*, in the case of the *Two Catherine*s (*g*), goes a great way to settle the present case. In that case, the ship sailed from Newport to Gibraltar, discharged the cargo there, proceeded to Ivica, in ballast, and thence with a cargo homeward to Providence. She was wrecked in the Narragansett Bay, and by great exertions of her master and crew, considerable portions of the ship and cargo were saved. The seamen claimed wages from Gibraltar to Ivica (the wages to Gibraltar having been paid), and from Ivica to Providence, asserting a right to wages, and if that could not be sustained, claiming a right to salvage equivalent to wages. The claim was resisted by an Insurance Company, to whom the things saved had been abandoned as for a total loss. The distinguished jurist before whom the case was argued, awarded the amount claimed on the voyage from Gibraltar to Ivica, as wages, and further as salvage, the wages of the seamen for the homeward voyage. In the case of the *Neptune* (*h*), too, the wages awarded by Lord *Stowell*, were wages which accrued on the voyage in which that vessel was wrecked, and were ordered to be paid out of the proceeds of the materials saved, so far as the frag-

(*g*) 2 Mason's Rep. 319.

(*h*) 1 Haggard's Rep. 227.

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ments would form a fund, though there was no freight earned by the owners. There is, however, this difference between the two cases of the *Neptune* and the *Two Catherines*, and the present case, that in the former two cases, the materials of the ships were saved by the exertions of the crew. In this case, nine of the crew came off with the master in the jolly-boat and pinnace, and of the twelve who remained with the mate, nine appear to have refused to obey his lawful authority and orders. The services of the remaining three, consisted only in the mooring of the ship in as convenient a place as might be, for safety during the winter, and in assisting the mate and people employed by him from the shore, in securing the ship's stores, sails and running rigging, having then abandoned her. I do not, however, think that the difference between the two cases referred to, and the present one, is material. As has already been said, the claim is for the wages on the outward voyage,—not for salvage, or for wages as salvage, on the homeward voyage. Their claim would be postponed to any claim for salvage, but is a strict legal right, accompanied by lien, and cannot be divested but by some act producing forfeiture. The different nature of the claim for wages on the voyage during which the wreck occurs, from the claim for wages on the previous voyage, is very distinctly put by Baron Locré (*i*). The article of the Marine Ordinance of Louis XIV., giving to mariners a lien on the materials saved by them from the wreck (*k*), would seem at first to confer the right only upon the seamen who actually did save the materials. But Boulay Paty (*l*), after examining and weighing the opinions of the different writers on this head (*m*), concludes with shewing that the seamen who

(*i*). *Esprit du Code de Commerce*, Liv. 2, Tit. 5, art. 258, tom. 2, p. 113.

(*k*) *Ordonnance de la Marine*, Tit. 4, art. 3.

(*l*) *Cours de Droit Commercial Maritime*, Tit. 5, sec. 8, tom. 2, p. 221, et seq.

(*m*) Valin, Delvincourt, and Boucher.

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have not been concerned in saving the materials, have a claim upon them for wages, to be postponed, however, to the claim of those who have assisted in saving the wreck or materials, which latter seem to be treated as salvors. I accordingly decree to John E. Cooke, Gilbert King, and Henry Scowen the amount of their wages upon the voyage from Milford to Quebec, and for one moiety of the time that the vessel lay at Quebec, reserving to Gilbert King such other recourse as he may be entitled to, out of the remains of the ship, when the proceeds come to be distributed by the Court.

The case of the remaining promoters, Charles Scott, John Smith, Job Swim, George Williams, Thomas Huzzey, Evan Lewis, Thomas James, and William Williams, stands upon an entirely different footing from that of their companions. Their claim is for the few days which elapsed between the time of their shipping at Quebec, and the stranding of the vessel and the abandonment of her by the master and crew. Notwithstanding the great principle, that freight is the mother of wages, and the safety of the ship the mother of freight; and that it would therefore seem, that in all cases where the freight was lost by shipwreck, the mariners could have no claim for wages; yet all the ancient Sea Laws (*n*), as well as the Ordinance of Philip the Second of Spain, in the year 1513 (*o*), and the marine Ordinance of Louis XIV. (*p*), give to the sailors wages out of the proceeds of what they save of the materials of the ship. There were no English decisions upon this point down to the year 1824, when in the case of the *Neptune* (*q*), Lord *Stowell* allowed to the seamen by whose exertions part of the vessel had been saved, the payment of their wages as far as the fragments

(*n*) Laws of Wisbuy, art. 15;
Laws of Oleron, art. 3; and Laws
of the Hanse Towns, art. 44.
(*o*) Tit. Average, art. 12.

(*p*) Liv. 3, tit. 4.; Des Loyers
des Matelots, art. 9.
(*q*) 1 Haggard's Rep. 227.

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of the materials would form a fund, although there was no freight earned by the owners. The wages so allowed are evidently in the nature of salvage, and a reward therefore for the meritorious services of the seamen in saving the wreck or fragments of the wreck. If another rule were adopted the seamen would have no motive for exerting themselves in saving any portion of the wreck, and would be induced, upon the occurrence of a *vis major* depriving them of wages, to give up all care of the ship and cargo at once (*r*). The rule adopted by Lord *Stowell* from the ancient maritime law of Europe, serves at once to protect the wreck from this danger, and at the same time by confining the salvage to the amount of the wages, holds forth no temptation to the seamen to expose the vessel to perils with a view of deriving from them high salvage, it being more the interest of the seaman to receive his wages in the ordinary tranquil course of navigation, than as a reward for services which must be generally laborious and perilous. But, in the case before the Court, it is not possible for me to say, that the wreck of the ship was saved by the exertions of these individuals with the master and rest of the crew (*s*). It is quite clear that the vessel having been wrecked in the course of the homeward voyage without earning freight, no wages were due (*t*). The claim of these parties could only be for wages as salvage on the wreck or fragments of the wreck saved by their exertions; but they having abandoned the wreck cannot be considered as salvors, and I must there-

(*r*) Mongalvy & Germain, *Analyse Raisonnée du Code de Commerce*, tom. 1, p. 386.

(*s*) See an elaborate opinion on this subject by the accomplished jurist who now presides over the District Court of the United States, for the District of Maine,

Judge Ware, in the case of *The Dawn*—Davies. Rep. p. 123.

(*t*) Unless the seaman produce a certificate from the master, as required by the Merchant Seamen's Act, 7 & 8 Vict. c. 112, s. 17.

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fore dismiss their claim, but without condemning them in costs (*u*).

Charles Alleyn and A. Campbell, for the promoters.
John J. C. Pentland, for the owners and master.

(*u*) Since the above decision was given a revision of the entire law of the mercantile marine has been effected, and wages are no longer to be dependent on the earning of freight. The Merchant Shipping Act (17 & 18 Vict. c. 104) contains the following provision on this head:—

“No right to wages shall be dependent on the earning of freight; and every seaman and apprentice who would be entitled

to demand and recover any wages if the ship in which he has served had earned freight, shall, subject to all other rules of law and conditions applicable to the case, be entitled to claim and recover the same, notwithstanding that freight has not been earned; but in cases of wreck or loss of the ship, proof that he has not exerted himself to the utmost to save the ship, cargo, and stores, shall bar his claim.”—Sec. 183.

Friday, 4th November, 1853.

CRESCENT—TATE.

ROWLAND HILL—RYAN.

Steamer making a short and unusual turn, and crossing the course of another steamer coming in the same direction, contrary to the usual practice and custom of the river, and the rules of good seamanship, for the purpose of being earlier at her wharf, condemned in damages for a collision.

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ROWLAND HILL.

These suits were brought, the one by the owner of the steamboat Rowland Hill, against the steamboat Crescent, and the other by the owner of the latter vessel against the Rowland Hill, for collision, on the 24th of July, 1852, when opposite the City of Quebec, on their downward trip from Montreal.

For the Rowland Hill it was alleged, that on that day, off Quebec, the Rowland Hill and the Crescent were coming down the St. Lawrence, during the ebb tide, and passing before the city of Quebec, previously to making the usual turn in order to come up against the tide to their respective wharves, the Rowland Hill being at that time about a hundred yards a-head of the Crescent. That the Rowland Hill, in order to come up to her wharf took a wide turn towards the mouth of the River St. Charles (where the steamboats coming to Quebec with the ebb tide usually turn), and, pursuing the safest course to avoid a collision with the shipping at anchor in the harbour, crossing and turning below a ship at anchor near the mouth of the river St. Charles, and below two other ships, which anchored at some distance from each other, and above the first-mentioned ship; and was coming up the river against the tide towards her wharf on the city side

CRESCENT.
ROWLAND HILL.

of the St. Lawrence. That the Crescent, coming down astern of the Rowland Hill, at the distance of about one hundred yards—being desirous, as promoter supposed, of coming in before the Rowland Hill—made a very short and unusual turn, crossing above the three ships before mentioned, far above where steamboats coming into Quebec, during the ebb tide, usually turn, and far above the point at which she ought to have turned—in consequence of the position of the vessels then lying at anchor in the stream—and bringing herself, by the shortness of the turn so near the wharf as to be unable to bring her stem up the river without backing out into the river. That the captain of the Rowland Hill, after having turned, and while coming up the river to her wharf—perceiving the Crescent attempting to make the turn above described, and fearing a collision—caused the engines of the Rowland Hill to be eased and then stopped, but could not cause his boat to back water without running foul of one of the three vessels above mentioned. That when the two steamboats came nearly opposite one of the wharves in the harbour of Quebec, commonly known as Gibb's wharf—the Crescent then going at her full speed—through the mismanagement, want of skill, and negligence of the persons on board and in charge of her, owing also to the fault they committed in turning, and to their not stopping nor moderating their speed, and also to the mismanagement of their helm at the moment of the approaching collision, ran foul of the Rowland Hill, the stern of the Crescent abaft the gangway, on her starboard side, coming into contact with the stem of the Rowland Hill, and carrying away the same. That the collision was occasioned by the inattention, mismanagement, and want of skill of the persons on board of the Crescent.

On the part of the Crescent it was pleaded, that at about the hour of seven in the morning, the Crescent was

on her downward trip from Montreal, the tide then being ebb, and the Rowland Hill about one hundred yards in front of the Crescent on the south side. That when the Rowland Hill was in front of St. Andrew's wharf, in the Lower Town of Quebec, she suddenly turned and crossed in front of the Crescent; which vessel could not within so short a time, and coming down with the tide—the space between the two vessels being so short—stop her engines; for, had she done so, she would have been cut in two by the Rowland Hill. That the Rowland Hill crossed the course of the Crescent, and made her sweep to come to the wharf at Quebec on the occasion propounded, sooner than is usual for steamboats to do when coming down to Quebec. That in consequence of so crossing, the Rowland Hill ran stem on against the Crescent, and came into collision with her, striking her within about fifteen feet of her stern, doing much damage thereto. That before coming into collision, the Rowland Hill was hailed from the Crescent, and requested to ease her engines, and back water, and that had she done so in time the collision would have been avoided. That from the time of the Rowland Hill first showing her intention to cross the course of the Crescent to the time of the collision—as well as from the vessels at anchor—it was impossible for the Crescent to stop her course. That the Crescent was preserving a direct course, and that the collision was wholly caused by the Rowland Hill crossing the course of the Crescent; and from the carelessness, unseamanship, and negligence of the crew of the Rowland Hill. That by the collision damage was done to the Crescent to the extent of 100% currency; and that the master and crew well performed their duty; and that the collision was not caused by their carelessness or want of skill.

CRESCENT.
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CRESCENT.
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JUDGMENT.

THE COURT.—The witnesses on the side of the Crescent are, the master, mate, pilot, wheelsman, and purser, with one person, a stevedore, who was ashore : and the testimony of the mate and wheelsman is decidedly against their own vessel. On the other side we have the master, two pilots, and three passengers, not concerned in the management of the vessel, and their evidence is confirmed by the master of the Alliance, who saw the occurrence from his own steam-vessel lying at Hunt's wharf ; by three persons, who saw it while standing on Barras's wharf at Point Levi ; and three others, who saw it from the deck of a schooner at Oliver's wharf : all six being either persons connected with steamboats or seafaring men. From this evidence it appears that the two steamers were coming from Montreal to Quebec, on the morning of the 24th of July, 1852 ; when opposite the city of Quebec the Rowland Hill was about 100 yards a-head of, or lower down the river than the Crescent, and was nearer the Point Levi side than the last-named vessel ; the tide was ebbing, and the Rowland Hill took the course usual on such occasions, and passed down below the lowermost wharf at the mouth of the St. Charles, when she turned, to stem the tide, and come to the wharf at which she was to land her passengers. The Crescent did not descend so low, but made a short and unusual turn, with the intention of passing across the course of the Rowland Hill and a-head of her, after she had turned and was coming up against the tide, so that the Crescent might reach her wharf before the Rowland Hill should reach hers. The people on board of the Rowland Hill, seeing the danger of a collision, stopped her engine, and would probably have reversed it, had they not been afraid of drifting under the bow of a vessel at anchor in the

vicinity: the Crescent did not stop, but kept her course towards Quebec, when her starboard quarter came in contact with the stem of the Rowland Hill, and the damage complained of was done. Under these circumstances the Court is called upon to pronounce which of the two vessels, if either, was in fault, and I think it can admit of no doubt that the collision resulted from a rash and hazardous attempt on the part of those on board of the Crescent to cross the course of the Rowland Hill, contrary to the usual practice and custom of the river and to the rules of good seamanship, for the purpose of being earliest at her wharf. Manœuvres of this dangerous kind, which might in a crowded port like ours result in the most serious loss of property and of life, ought to be discountenanced. At the same time I am happy to bear testimony to the great prudence of the commanders of the steamboats on our river, which has made such accidents of rare occurrence; and even on this occasion the objectionable manœuvre appears to have proceeded from a spirit of eager competition and from miscalculation, and not from any wilful attempt to injure the competing vessel. The Court therefore dismisses the action of the owner of the Crescent against the Rowland Hill, with costs, and maintains that of the owner of the Rowland Hill against the Crescent, also with costs; and refers the damages to the registrar and merchants, to ascertain the amount in the usual manner.

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ROWLAND HILL.

Sol.-Gen. Ross, for the Rowland Hill.

Alley, for the Crescent.

Friday, 4th November, 1853.

SARAH ANN—HOCKER.

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Where the collision was the effect of mere accident, or that overriding necessity which the law designates by the term *vis major*, and without any negligence or fault in any one, the owners of the ship injured must bear their own loss.

This was a cause of collision, promoted on behalf of the owner of the William against the Sarah Ann, for damage sustained in the harbour of Quebec, on the 11th of October last.

The libel given in and admitted on behalf of the promoter of the suit, set forth :—

That on the 11th of October last, the ship or vessel the William, whereof one John Till then was master, was lying at anchor in the river St. Lawrence, opposite to the city of Quebec, within the ebb and flow of the tide, having on board a full cargo of provisions, with which she was about to proceed to sea for a port in Newfoundland. That about three o'clock in the afternoon of that day, the ship or vessel the Sarah Ann came to anchor at flood tide, a-head and to the eastward of the William. That the Sarah Ann is a vessel of the burthen of about 500 tons, and had then on board a full cargo of merchandise, and was deep in the water. That from the time when the Sarah Ann so came to anchor to the eastward of the William, until the hour of twelve at noon on the following day, both vessels, at the different changes of the tide, sheered in the usual way clear of each other. That between the said hour of twelve at noon and the hour of

one in the afternoon of the last-mentioned day, it being then the commencement of the flood tide, the William was riding at anchor in the same place where she had first cast anchor, with two anchors out, the one with sixty, and the other with forty-five fathoms of chain, having lately before turned with the tide, and then riding with her head to the eastward. That immediately afterwards the Sarah Ann was seen turning with the tide, and in doing so she broke her sheer, and began to drift towards the William, nearly broadside on, and being unable to hold her ground, dragged towards the William, and ran foul of her, the larboard bow of the Sarah Ann striking the starboard bow of the William. That while the Sarah Ann was thus drifting and dragging towards the William, the people of the latter vessel hailed the Sarah Ann, telling them to keep her clear of the William, to which they received no intelligible answer. That the William, on observing the Sarah Ann coming upon her, put her helm hard a starboard, causing her head to turn to port and towards the town, as much as her two anchors and chains would permit, in order to avoid a collision. That the William is of the burthen by admeasurement of 159 tons or thereabouts, and was navigated by a competent master and crew. That at and before the time she was so struck by the Sarah Ann, the William was tight, staunch, and in good condition. That at and before the said collision, the Sarah Ann was riding with a single anchor, with about forty fathoms of chain out in twelve fathoms of water, and that the wind was then blowing, and had been blowing from the previous day, from the westward, the Sarah Ann being to leeward of the William; and that the collision occurred solely through the inattention and want of prudence and skill of the persons on board of the Sarah Ann; and not by or through the inattention or want of prudence or skill of the persons on board of the William. That by the assistance and

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exertions of the persons on board the William, the two vessels were at last separated, and the Sarah Ann then sheered clear of the William, but the Sarah Ann was so negligently and unskilfully managed that she would again have run foul of the William, had not the persons on board of the Sarah Ann, at the urgent request of the master of the William, hoisted their main-top-mast-stay-sail, and by this means escaped a second collision; and that had the Sarah Ann, when she began to drag towards the William, adopted the like or similar means, and let go her second anchor, no collision would have at all occurred. That by the collision the Sarah Ann carried away the main-sail of the William from the night-heads to the fore-rigging, and about twenty feet of bulwark, and also her channel guard, damaged and started her covering boards, split and damaged four stanchions, head-rails and knees, and carried away her cat-head, block, and fall, and she was otherwise considerably damaged.

The responsive plea or allegation, on the part of the Sarah Ann, denied that the accident was occasioned by the mismanagement of those on board of her: on the contrary it was alleged:—

That about fifteen minutes after the hour of two in the afternoon of the 11th of October last, the Sarah Ann came to anchor opposite the city of Quebec, a-head and to the eastward of the William, and at a sufficient distance from the William to prevent accidents, and gave to the William a fair berth. That the Sarah Ann was a vessel of 377 tons, and had on board a full cargo, and was then ready for sea, merely requiring a trifling repair to one of her masts, which had since been made. That from the time when the Sarah Ann came to anchor to the eastward of the William until the hour of twelve of the following day, both vessels, at the different changes of the tide, sheered in the usual way clear of each other,

and never approached each other nearer than two cables' length, and so sheered clear of each other three several times. That in the afternoon of the 11th, the wind sprang up from the south-west, and increased in violence, until during the night of the 11th and 12th it blew quite a gale of wind, and several ships in the harbour were driven from their moorings. That the William on the 11th, in the day, was riding at a single anchor, and had been so riding at a single anchor from the time she first came to anchor there, namely, for several days. That the wind continued unabated from the south-west during the whole day of the 12th, so much so, that vessels left their mooring places on their intended voyages without any canvass set, and while the tide was running flood, and went round Point Levi in that way. That the William, during the night of the 11th and 12th, and the morning of the 12th, propelled by the wind from the south-west, dragged her moorings, and came nearer to the Sarah Ann; and that the persons in charge of the William, perceiving that she was dragging her anchor, let go a second anchor, but not until her position towards the Sarah Ann was materially changed. That from the evening of the 11th, until the time of the collision, the wind blew from the south-west too violently to admit of any vessel dragging her moorings against the wind; and in fact the Sarah Ann did not, at or about the time of the collision, stream to her anchor, from the violence of the wind being stronger than the tide; and that if the Sarah Ann had dragged her moorings at all, it must have been during the ebb tide, when both wind and tide were down the river: but if she had so dragged her moorings she would have got further away from the William, not nearer. That during all the time, the Sarah Ann had on board of her a competent crew to navigate her, and had such crew at the time of the collision. That on the contrary, the William was without a crew, and at the time of the

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collision there was on board of the William only one man, namely, the pilot. That one man alone was insufficient to do any thing on board of the William to avoid the collision; and that if there had been a sufficient number on board to haul in her chain, or to pay out chain, either would have prevented the collision. That it is the custom of the port of Quebec for vessels to ride at one anchor, and that all the vessels in sight of the William and of the Sarah Ann, on the 11th and 12th of October, were riding at one anchor; and that the William was not at any time moored to two anchors, but after drifting and dragging her anchor she let go a second anchor, and was riding at two anchors. That the Sarah Ann never dragged her anchor at all, and that the bearings at the time of the collision showed that she was at the very same place she anchored at on the 11th. That by the exertions of the persons on board of the Sarah Ann the two vessels were separated; and that at that time there were on board of the William, only the master and one or two other persons. That when somebody on board of the William requested the persons on board the Sarah Ann to hoist their top-stay-sail, the persons on board of the Sarah Ann were actually engaged in hoisting it, and that they did not do so at the suggestion of any body on board of the William, but of their own accord. That the collision in question did not occur by or through the inattention and want of prudence and skill of the persons on board of the Sarah Ann, but solely from the William dragging her moorings before the wind and tide; and from there being no competent crew in and on board of the William to navigate her, and to take charge of her in port; and that the collision occurred from the William coming down upon the Sarah Ann.

There were examined on behalf of the owner of the William, five witnesses, viz:—John Till, the former master, Charles Pitch, the new master, Damien Boulanger,

pilot (a), and James Ryley, and George McCulloch, SARAH ANN. seamen.

On the other side seven witnesses were produced and examined, viz :—Thomas James Hocker, the master of the Sarah Ann, Jacques Plante, her pilot (b), Thomas Flaven, second mate, James Coastes, Clement Leblanc, and Joseph Gundy, seamen, and Christian Gesloff, the carpenter of the Helen, who happened to be employed on board the Sarah Ann, before and at the time of the collision.

The case was argued on the 28th of October, and remained under consideration until this day, when the Court pronounced the following judgment :—

JUDGMENT.—Hon. Henry Black.

The facts as gathered from the rather voluminous depositions in this cause are as follows :—On the 1st of October last, the William, a brig of 149 tons, came to anchor in the harbour of Quebec, being then laden with a full cargo and ready for sea ; and being detained in consequence of a change of masters, she lay riding at single anchor until the 11th of the same month. About three o'clock in the afternoon of that day, it being then flood tide, and wind fresh from the westward, the Sarah Ann, a vessel of 377 tons, also fully laden, and ready for sea, with the exception of getting up a new topmast, came to anchor, about two cables' length to the eastward of the William, and lay there also at single anchor : and it is admitted on both sides, that in the position so taken by her, the Sarah Ann gave the William a fair berth ; and that the two vessels at the three next succeeding changes of the tide swung in the usual manner clear of each other. The wind blew hard from the south-west,

(a) (b) No allegation exoeptive to the testimony of the pilot was given on either side, and publi- cation of the evidence was decreed by consent of parties.

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from the time the Sarah Ann came to anchor, and increased during the night between the 11th and 12th, blowing very heavily in violent squalls. The pilot of the William states that during that night, and between twelve and thirteen hours before the collision, he let go a second anchor with about forty-five fathoms of cable, the first anchor having sixty fathoms, and that his motive for so doing was, "because it commenced blowing hard," or in other words because the gale from the south-west had increased. He states that the William did not drag her anchor, but the pilot of the Sarah Ann, and several of the other witnesses say that she did, and that she approached nearer to the vessel last-named, as she must have done if she drifted at all; and they are equally positive that the Sarah Ann did not drift; indeed, it was most improbable that she should drift upwards against the wind, and if she had drifted downwards or to leeward, she would not have lessened but increased her distance from the William. At flood tide, between one and two in the afternoon of the 12th, the Sarah Ann, in swinging round with the tide upon her anchor, came into collision with the William, the larboard bow of the Sarah Ann striking the starboard bow of the William, and occasioning the damage complained of. At this time there was no person on board the William, except the Pilot, Damien Boulanger, the former master having gone ashore with the two seamen who composed the crew, and the new master not having gone on board. Now, in order to support the present action, it was necessary distinctly to prove that the collision arose from the fault of the persons on board of the Sarah Ann only; or from the fault of the persons on board that vessel, and of those on board the William, in which latter case the Court would be called upon to apportion the damages between the parties according to maritime law, as administered in the Court of Admiralty. In the former case the Sarah Ann alone would be liable for the

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whole; if neither vessel, or the suffering vessel alone were in fault, the loss would remain where it fell. The view taken by the Court is, that it has not been proved that there was any fault on the part of either vessel, but that the collision was the effect of mere accident, or that over-riding necessity which the law designates by the term *vis major*. Both vessels were originally properly anchored, and had room enough to swing clear; there is, therefore, no ground of complaint on that head. It seems most improbable that the Sarah Ann should drift upwards with the tide, while the wind was in the direction and of the strength described by the witnesses on both sides, even if she did break her sheer in swinging; and the master of that vessel states positively that he took bearings by compass before and after the accident, and found her position to be precisely the same; and this statement is corroborated by all the witnesses on that side. On the other hand, it appears by no means improbable that the William should, by force of the wind and ebb tide, have drifted nearer to the Sarah Ann, and her pilot's letting go another anchor during the night preceding the accident shows that he at least apprehended the probability of her so doing; for, as it is well-known to be inconvenient to lie in a tide-way with two anchors down, it is not likely the pilot would have let go the second unless he felt that the William was dragging the first, or likely from circumstances to do so. And though the witnesses on that side say that the William did not drag her anchor, yet those on the other side declare positively that they saw her drifting towards the Sarah Ann. It lay with the William to prove fault on the part of the Sarah Ann, and as I am of opinion that this proof has not been made, but that the evidence goes to show that neither vessel was in fault, the action must be dismissed. It is to be regretted that, in a matter involving so small an amount of damages, the complaining party should have thought proper to

SARAH ANN. institute proceedings of a nature to occasion heavy costs, from which, as he has failed to make out his case, the Court cannot relieve him.

Sol.-Gen. Ross, for the William.

Stuart and Vannorous, for the Sarah Ann.

Tuesday, 17th January, 1854.

ROSLIN CASTLE—SADDLER.

GLENCAIRN—CRAWFORD.

When two sailing vessels are upon opposite tacks, and to all appearance will come in contact at their angle of meeting, it is usual for the ship upon the port tack to give way for that on the starboard tack.

ROSLIN CASTLE.
GLENCAIRN.

These were causes promoted by the owners of the ship Glencairn against the barque Roslin Castle, and by the owners of the Roslin Castle against the Glencairn, each vessel proceeding against the other, for a considerable damage by a collision which took place on the 6th October last, while both vessels were in the North Atlantic Ocean, on their voyage from Great Britain to Quebec, the jib-boom of the Glencairn going through the foresail of the Roslin Castle, and being carried away, and the two vessels coming together, with the port-bow of the Glencairn to the starboard side of the Roslin Castle at the mainchains.

The facts of this case are sufficiently noticed in the following judgment of the Court:

JUDGMENT.—*Hon. Henry Black.*

It appears that on the sixth of October now last, the Glencairn, a ship of the burthen of 949 tons, with a cargo consisting chiefly of eight hundred tons of iron; and the Roslin Castle, a barque of 450 tons, but in ballast; were both on their voyage from Great Britain to Quebec, and were in the North Atlantic Ocean, at a distance of some fifty miles from the island of St. Peter, which is off the coast of Newfoundland. In the course of that day they

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had been in sight of each other, and both had been going on the port tack, with the wind from the south-west, or rather to the westward of that point; the Glencairn was then to leeward, but was the faster ship. About eight o'clock in the evening, the wind still blowing from the same quarter, the Glencairn was put about on the starboard tack, both vessels being on a wind, the Roslin Castle continuing on the port tack, with the wind moderate, and going at the rate of about six knots through the water. The night was tolerably clear; the witnesses for the Glencairn saying that a ship of her size could be seen from one to two miles off, but not saying how far off the Roslin Castle was when first seen by them; the Roslin Castle's witnesses, however, say that the Glencairn was not seen from the Roslin Castle until she was only from half to a quarter of a mile from that vessel, on the lee bow; nor does there seem any reason to doubt that the vessels saw each other about the same time. According to the witnesses for the Glencairn, that ship had been about thirteen minutes on the starboard tack, when the Roslin Castle was seen from her; but the witnesses for the Roslin Castle say that when the Glencairn was first seen from that vessel, the Glencairn had her head to the eastward, that she had the appearance of a ship going to the eastward, and that the look-out man of the Roslin Castle announced her as a ship "running," her three masts being open; and they assert their belief that the Glencairn had then just tacked. Both ships appear to have been fully manned, and both appear to have shown lights as soon as they saw each other. Whatever may have been the position of the Glencairn when first seen by the Roslin Castle, it is asserted on both sides that she immediately afterwards luffed up on the starboard tack, and came as close to the wind as possible, her sails, in fact, shaking before the collision. The Roslin Castle continued her way on the port tack. In this manner the

ships approached each other, the master of the Glencairn hailing the Roslin Castle to bear up (that is, port her helm), and pass to leeward (or on the port side) of the Glencairn. The Roslin Castle's witnesses assert that there was not room to do so, and that if it had been done the Roslin Castle would have struck the Glencairn end on; and that the Glencairn ought to have been kept clean full, when she would (they say) have passed clear of the Roslin Castle on the starboard side. The Glencairn's witnesses, on the other hand, say that there was plenty of room for the Roslin Castle to bear away, and pass clear. However this may be, it is certain that both vessels kept on their way and approached each other, the Glencairn luffing till her sails shook, and the Roslin Castle, as she neared the Glencairn, putting her helm down, and bringing the vessel up to the wind. Under these circumstances the collision took place, the jib-boom of the Glencairn going through the foresail of the Roslin Castle, and being carried away, and the two vessels coming together with the port bow of the Glencairn to the starboard side of the Roslin Castle, about the main-chains. By the collision considerable damage was done to both vessels, for the amount of which each has proceeded against the other in this case. The nautical rule which has long been established, undoubtedly is, that if two sailing vessels, both upon a wind, are so approaching each other, the one on the starboard, and the other on the port tack, as that there will be a danger of collision if each continue her course, it is the duty of the vessel on the port tack immediately to give way, and it is held that the vessel on the port tack is to bear away so early and effectually as to prevent all chance of a collision occurring. The decision of this case must then depend upon the question whether there was or was not any peculiar circumstance which justified the Roslin Castle in not observing this rule. The Court is therefore desirous of

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obtaining the assistance of a gentleman of the nautical profession in determining the following questions :

1. When the Roslin Castle and the Glencairn first saw each other, was there, or was there not, sufficient room and time for the Roslin Castle to have avoided all risk of a collision by putting her helm up, and bearing away ?

2. Was there anything in the position of the Glencairn when first seen by the Roslin Castle, which justified the latter vessel in not immediately putting her helm up and bearing away ; and if there was, was there, or was there not, still sufficient time and room for the Roslin Castle to have avoided all risk of a collision by putting her helm up, and bearing away as soon as she saw that the Glencairn was upon the starboard tack, and upon a wind ; and if the Roslin Castle were justified in not putting her helm up, and bearing away, was she also right in putting her helm down, and luffing up as she neared the Glencairn ?

3. Supposing that the Roslin Castle was, under the circumstances, justified in acting as she did, was the Glencairn justified in not bearing away, but on the contrary, putting her helm down and luffing up as the Roslin Castle neared her ?

4. Did the collision occur from any negligence or want of skill, or any violation of any rule of navigation or of good seamanship, on the part of either and which of the vessels ; or was it the result of over-riding circumstances over which neither vessel had any control, and for which neither is responsible ?

In answer to these questions, Lieutenant Ed. D. Ashe, R.N., who had attended at the hearing of the case, as an assessor, delivered in a written opinion to the following effect :—

“ From what has been said on both sides, it appears that the Glencairn was on the starboard tack, and that

the Roslin Castle was on the larboard tack, steering a course. That the Glencairn, by keeping a close luff with her sails lifting, showed that she intended to keep her wind, as by all the laws of navigation she had a right to do. On the other hand, the Roslin Castle, with a leading wind, and the ship well under command, could have avoided all collision by keeping away, and bringing the Glencairn on the weather bow; instead of which she commits the lubberly act of endeavouring to cross the bows of a vessel, when it was obviously her duty to pass under the stern. And here I must remark, that in the evidence given by the crew of the Roslin Castle, they state that if the helm of that ship had been put up, she would have run "end on" to the Glencairn. It is true, there was a time when putting the helm up would have made matters worse, but every sailor of the Roslin Castle must have known that there was ample time in five minutes, or even one, to have avoided all chance of collision, by the Roslin Castle putting her helm up. It is, therefore, my opinion, that the collision took place in consequence of the Roslin Castle not paying attention to the known laws of navigation."

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THE COURT.—The opinion of Lieutenant Ashe being that the Roslin Castle was solely to blame, the suit brought by the owners of that vessel against the Glencairn must be dismissed with costs; and an interlocutory decree entered up against the Roslin Castle, for the damages sued for by owners of the Glencairn; the amount to be ascertained in the usual form, viz., by a reference to the registrar and merchants.

Edw. Jones, for Glencairn.

Charles Alleyn, for Roslin Castle.

Friday, 2nd June, 1854.

NIAGARA—TAYLOR.

ELIZABETH—NOWELL.

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COLLISION—Course to be pursued by vessels in danger of colliding
—Look-out—Lights.

These cases originated in a collision which took place on the 3rd of November last, between the ship Niagara, while sailing down the river St. Lawrence, on her homeward voyage to Liverpool, and the barque Elizabeth, coming up in tow of the steamer Providence, under the circumstances noticed in the following judgment of the Court.

JUDGMENT.—*Hon. Henry Black.*

The Niagara, a vessel of about 422 tons burthen, laden principally with grain and deals, sailed from Quebec on her homeward voyage to Liverpool, in the afternoon of Thursday, the 3rd of November last, in charge of a regular branch pilot; and at about the hour of a quarter to seven on the same day had gone round Point Levi, and was about breast of Indian Cove, the wind being then at west by north, or west-north-west, blowing a moderate breeze; the tide being flood and the ship having all sails set except the studding-sails, and being about mid-channel or rather to the southward of it, and going down the river at the rate of about three miles an hour. She had passed two ships at anchor, the one on the starboard and the other on the port side; the one apparently lying on the north side of the channel, and the other on the south side of it. At the same time, the barque Elizabeth, a vessel having between three and four hundred tons of railroad iron on board, was coming up the river St. Lawrence, on her outward voyage from England to Quebec,

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in charge of a regular branch pilot, and in tow of the steamer Providence, which was engaged to take her to her intended wharf at Point Levi. The tow line was about thirty fathoms in length; she had all her sails furled and her yards braced up, the wind being a-head, and was going at the rate of about five miles an hour, that is, two miles faster than the flood tide, which carried her about three miles an hour. The moon was then about three days old. At about a quarter to seven, the Elizabeth, and the steamboat in tow of which she was, had also got abreast of Indian Cove. The night at the time, seems from the evidence, to have been reasonably clear, and sufficiently so for lights to be seen at a moderate distance; though there is some slight discrepancy on this point, the witnesses from the Elizabeth and from the steamer declaring that the night was very clear and star-light, and that the moon had been visible early in the evening, and that they could see both shores, and the light on board the ships in the harbour and the lights of the town: while the witnesses from the Niagara say that it was clear to the westward, but hazy to the eastward, and that the moon was clouded and not to be seen; they do not, however, pretend that lights could not be seen at a reasonable distance, in fact, the look-out man of the Niagara (Owen Evans) says that it was a pretty clear night, and that he saw the steamer Providence about twenty minutes before the collision, which forms the subject of the present controversy. It is sufficiently proved that the Niagara had a light at her bowsprit end, "a reflecting powerful light;" that the steamer had two ordinary lights, one on each paddle box, and a bright red light forward; and that the Elizabeth had a light in her starboard fore rigging, about sixteen feet above the deck. It appears that each of the three vessels was navigated by a competent number of officers and men, and was staunch, tight, and in good order.

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Under these circumstances a collision took place between the Niagara and the Elizabeth; the Niagara, according to some of the witnesses, striking her cut-water against the starboard bow of the Elizabeth, but according to others, the starboard bow of each vessel striking the starboard bow of the other. The injury done to the Niagara is stated by her master to be, the starboard side of the top gallant fore-castle started and several stanchions broken, the figure-head and cut-water broken, head rails and knees broken, windlass bits started, cat head broken, bowsprit and jib-boom carried away, fore-top mast and fore-yard and fore-top gallant yard broken, sails, standing and running rigging destroyed and broken forward, and all the gear connected with the bowsprit, main-top gallant mast and stays carried away, and the stock of the bower anchor broken. The injury done to the Elizabeth is stated by her master to have been done by the cut-water of the Niagara striking the starboard bow of the Elizabeth, and breaking seven of her timbers in the bow, the top-gallant rail and bulwarks, injuring the after-part of the fore-rigging, the main-top sail and cat-head breaking four planks, covering boards and two paint streaks, and also destroying the ceiling and water way, two chain plates and a great part of the fore-rigging, the bowsprit of the Niagara having run through it.

With regard to the circumstances which immediately preceded and occasioned the collision, the evidence, as usually occurs in like cases, is conflicting. Owen Evans, the boatswain and look-out man of the Niagara, says, "that he was on the top-gallant fore-castle of the vessel, walking from side to side, in order that he might see in every direction, when at about a quarter to seven, the Niagara having just passed a vessel to the southward at anchor, he saw two lights a-head, which he at first took for the lights of a vessel at anchor; he believes them to

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have been a quarter of a mile off, but almost immediately seeing sparks, and the lights proceeding more to the southward, he knew it to be a steamer, and thereupon cried out to the pilot of the Niagara, 'lights on the starboard bow;' the pilot came forward, and then gave orders to the man at the wheel to starboard the helm, which was at once done, the ship immediately answered her helm;" he says that "the steamer was just in the centre of us about half a cable's length to the southward," that the steamer was then avoided, but that the Elizabeth kept her helm a-port; and the consequence was that a collision took place, the two ships striking one another on the starboard bow; that the lights being between him and the Elizabeth, which the steamer had in tow, he did not observe the Elizabeth until about nine or ten minutes before the collision. On being cross-examined, he says, that he saw the steamer Providence perhaps about twenty minutes before the collision. The statement of the look-out-man, Evans, is substantially confirmed by that of the master, mate, and six of the men of the Niagara, with this material difference, that whereas Evans admits that he saw the steamer twenty minutes before the collision, the master says he only saw the steamer from a minute to a minute and a half before the collision, and that he saw the Elizabeth ten or fifteen seconds before the collision. The mate and seamen vary as to the time they saw the steamer, stating it at from two to six minutes before the collision, and all agreeing that they saw the Elizabeth about a minute after they saw the steamer. They agree, generally, in stating that the look-out-man reported lights on the starboard bow; that the pilot then went forward and immediately afterwards ordered the helm to be put a-starboard, and that the order was instantly obeyed, and the helm put hard-a-starboard; that the Niagara was then going four or five knots and obeyed her helm directly; that her head was

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got well off to the north in order to clear the steamer, and that she did clear, but that in consequence of the Elizabeth,—which they say was from sixty to ninety fathoms astern of the steamer,—putting her helm a-port instead of steering after the steamer, she sheered broad off the steamer's starboard quarter, and she (the Elizabeth) and Niagara came into collision, each striking the other on the starboard bow, and doing the damage complained of. There is little variance among the witnesses from the Niagara as to the position of the lights of the steamer when first seen; the look-out-man says he saw the lights a-head, and the mate says, when he saw the lights first they were about half a point on the starboard bow; the master says that the steamer when first observed was a little on the starboard bow of the Niagara, and appeared to be steering more to the southward.

On the other side, the master, mate, second mate, carpenter, boatswain, and a seaman of the Elizabeth agree in stating, that they saw the Niagara between three and five minutes before the collision, that she was under a press of sail and converging towards the steamer and the Elizabeth; 'hat after hailing her and receiving no answer, the pilot ordered the helm of the Elizabeth to be put a-port, because, he said, that she (the Niagara) was coming across the Elizabeth's bow. That when the Niagara was so hailed, she was sufficiently distant from the steamer and the Elizabeth to make her pass clear of both, had her helm been put a-port, but that they did not perceive that she altered her course, and that she consequently ran foul of the Elizabeth, her *out-water* striking the starboard bow of that vessel. They say, that until the helm of the Elizabeth was so put a-port, she was steered directly in the course pursued by the steamer. It is stated by the master of the Elizabeth, and not satisfactorily rebutted, that the master of the Niagara after-

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wards told him that the Elizabeth was not perceived by the people on board the Niagara more than half-a-minute before the collision, owing, as he said, to the smoke of the steamboat (a). It is proved that the master of the Elizabeth expected the Niagara might pass between the steamer and the Elizabeth from the course the Niagara steered, and ordered the carpenter to be ready with his axe to cut the tow-rope in case of her doing so, which she might have done if they had ported her helm. The carpenter says that the Niagara was steering almost across the river before the collision. The mate says that the Niagara continued in the same course until within about forty fathoms from the Elizabeth, when she apparently put her helm a-starboard and brought her bow more directly down the river. The mate also says that he saw the Niagara some time before he reported her, but did not perceive that she was pursuing a wrong course until about three minutes before the accident occurred.

There has been no attempt on either side to attribute misconduct to the steamer, and the master, one of the part-owners, and one of the hands on board her at the time have been examined. These people state, that when they first saw the Niagara she was about fifteen arpents (half-a-mile) a-head, and about three arpents to the northward of the steamer's course,—that the course of the steamer was then altered a little more to the south,—that the Elizabeth was well steered, straight after the steamer,—that when the Niagara was about two arpents above, and three or four arpents to the northward of the steamer, she altered her course and ran across the river, towards the steamer, scraping the steamer with her martingale from the wheelhouse to the stern. That when the Niagara was seen to alter her course, the steamer's helm was put hard

(a) The Manchester, 1 W. Rob. 65.

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a-starboard, and that had not this been done, the Niagara would have run the steamer down; and that the pilot of the Niagara cried out to the steamer's people to starboard their helm, though not till after they had done so. That after passing the steamer, the Niagara's head inclined a little more to the northward from the force of the shock (as they think), and that in less than one minute after she cleared the steamer, the Niagara ran foul of the Elizabeth. That they do not know what parts of the two vessels came in contact,—they simply heard the crash. They say they were quite surprised to see the Niagara come directly towards the steamer. That it appeared to them that the Niagara had no watch. That on board the Elizabeth the greatest care seemed to be taken to avoid accidents. They say that the distance between the steamer and the Elizabeth was about thirty fathoms. The evidence of Charles Nolet, the pilot of the Hampden, one of the two ships at anchor, makes no material difference in the case. It confirms the statement of the steamer's people, that the Niagara struck her before she struck the Elizabeth; and also the statement on the part of the Elizabeth, that the Niagara was steering across the river, and did not alter her course. This man's impressions are that the Niagara did not see the steamer until too late.

Both vessels were engaged in doing what it was perfectly lawful for them to do, there being no rule or law preventing vessels from entering or leaving the harbour of Quebec at any hour, or obliging them to keep any particular track or part of the channel in so doing. The Niagara had the wind large, and as steamers are to be considered in the light of vessels navigating with a fair wind, the steamer and the Niagara may be considered in this respect as on an equality. The Elizabeth was powerless to a very great extent; she had a head wind and no sails set, and she was fast to the steamer, so that she

could only sheer to a certain distance on either side of the course in which she was towed by the steamer. No blame is attributable by either party to the steamer, and the only question raised as to the Elizabeth's action is, whether she exercised her power of sheering properly or improperly; and it may be, that in porting her helm when the Niagara was close upon her, she did right. The general rule is, that when two vessels are approaching each other, both having the wind large, and are approaching each other, so that if each continued in her course there would be danger of collision, each shall port helm, so as to leave the other on the larboard hand in passing; but it is not necessary that because two vessels are proceeding in opposite directions, there being plenty of room, that the one vessel should cross the course of the other, in order to pass her on the larboard. The questions arising in these actions seem to be :—

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1. Whether from the whole tenor of the evidence, it appears that there was a proper and efficient look-out kept on board the Niagara; and whether timely notice was given by the look-out man of the proximity of the steamer and the Elizabeth?

2. Whether at the time when the lights of the steamer were seen by the Niagara, the Niagara was pursuing a direct course down the river, or was in fact standing too much to the southward, and crossing the channel and the course of the steamer and her tow?

3. Whether, when the danger of collision was seen by the Niagara's pilot and people, the most seamanlike and proper means were adopted by them to avoid the danger, and more particularly, whether it was right to put her helm a-starboard?

4. Whether, when the danger of collision was seen by the people of the Elizabeth, the most seamanlike and proper means were adopted by them to avoid the danger,

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and more particularly, whether it was right to put her helm to port ?

5. And, generally, whether any rule of navigation or of seamanship was violated by either and which of the vessels ; or whether there was any fault, neglect of duty, or want of proper precaution or skill on the part of those in charge of either and of which vessel ; or, did the accident arise from circumstances over which neither vessel had any control ; and is it, therefore, to be considered as an unavoidable misfortune for which neither can be blamed or held responsible ?

Upon these several points the Court will avail itself of the long practical experience and great professional skill of Captain Jesse Armstrong, the Harbour Master of Quebec, and one of the Wardens of the Trinity House ; and of Lieutenant Edward D. Ashe, of the Royal Navy, and Superintendent of the Observatory at Quebec.

At a subsequent sitting of the Court, Captain Armstrong and Lieutenant Ashe, who had heard the arguments in the case as assessors, gave in the following answers to the questions submitted for their consideration :—

“ 1. It appears that there was a look-out-man forward at his post, and that he took the lights of the steamer Providence for those of a vessel at anchor, as she, the said steamer, did not show the proper lights that are required to be carried according to law. And we consider that the pilot, or one of the officers of the ship, should have been also forward on the look-out.

“ 2. It does not appear sufficiently clear that the Niagara was standing to the southward, across the river, as is stated in the evidence given by the crew of the Elizabeth. The steamer put her helm hard-a-starboard,

and gave a broad sheer to the southward, which might have given the Niagara the appearance of crossing the Elizabeth's bows.

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"3 As the lights were not known to be those of a steamer, until close under the starboard bow, the only means that could then be adopted to avoid collision, was by putting the helm of the Niagara a-starboard.

"4 Whether the Elizabeth was right in putting her helm hard-a-port, is a question that can be decided only by those who were eye-witnesses of the collision. But it appears to us, that had the Elizabeth put her helm hard-a-starboard instead of port, in all probability the collision would not have occurred.

"5. There was no want of seamanship on either side, but the Niagara showed a want of proper precaution in approaching lights, even supposing them to have been on board of a ship at anchor.

"We think proper to remark, that had the steamer Providence taken the usual course, and put her helm a-port on seeing the Niagara's lights, in order to pass her on the proper side, no collision would have taken place."

THE COURT.—The answers appear rather to be a summary of the probable facts of the case, than a professional opinion upon the points submitted in the questions founded upon those facts. Thus, in the answer to the first question, it appears doubtful whether the assessors are of opinion that there was or was not a proper and efficient look-out kept on board the Niagara; and the answer is wholly silent as to whether timely notice was given by the look-out man. In the answer to the second, no opinion is expressed as to whether the Niagara was or was not standing across the channel to the southward. The answer refers only to the evidence of the crew of the Elizabeth; and the assessors may have overlooked that of the pilot of the Hampden, one of the ships at

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anchor; and, therefore, certainly not affected by the supposed broad sheer given to the steamer. The third answer justifies the course pursued by the Niagara in putting her helm a-starboard, when the steamer was close under the starboard bow; but does not answer the question whether her pilot adopted the most seamanlike and proper means to avoid a collision, as soon as the lights of the steamer and Elizabeth were seen. In the answer to the fourth, I doubt whether the assessors have adverted to the fact of the Niagara's grazing the steamer from the wheel house to the stern; and to the evidence of the people of the Elizabeth, that the position and course of the Niagara were such, that the master of the Elizabeth ordered the carpenter to be ready with his axe to cut the tow-rope, in order to allow the Niagara to pass between the tug and the tow. The answer to the fifth question does not express, in a sufficiently definite manner, the opinion of the assessors;—whether either, and if either, which of the vessels was so far in fault as to throw the responsibility of the collision upon her; or whether neither was so in fault; and upon this point I should wish them to give a decided opinion. I may remark, that if a vessel make every precaution against approaching danger, it is not sufficient to subject her to damage for injury to another by collision, that in the moment of danger those on board such vessel did not make use of every means that might appear proper to a cool spectator, there must be gross negligence (*b*). But one must not go too far back as regards the movements and positions of the vessels; the question being solely, whether from the time there was any reasonable probability of a collision, proper measures were or were not adopted on either side. I may further observe, that in these actions neither party has imputed blame or misconduct to the steamer; while

(*b*) Burns v. Stirling (1819), 2 Mur. 96, Scotch Rep.

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the answer of the assessors might be construed to throw the blame upon her, rather than upon either of the sailing vessels: first, by asserting incidentally that she did not show the proper lights; and secondly, by stating that if she had put her helm a-port on seeing the Niagara's lights in order to pass her on the proper side, no collision would have taken place. If the collision arose solely out of the misconduct of those on board the steamer, both the Niagara and the Elizabeth are exempt from responsibility; and the action on the part of each must be dismissed, leaving them to their recourse against the steamer. The law in such cases is, that the tow is not responsible for an accident arising from the mistake or misconduct of the tug (*c*). It appears to me, that the evidence shows the rule of the Trinity House, as to lights to be carried by a steamer (*d*) to have been substantially complied with by the steamer. She had a red light in the bow, and she had two ordinary or white lights,—one on each paddle-box; the rule requiring one white light at the stern, sufficiently high to be seen over the paddle-boxes, where, as in the present case, the steamer has no mast. But upon this point, Captain Armstrong, as an officer of the Trinity House, and a man of much experience in steamboat navigation on the river, will be able to give a decided opinion. With respect to the opinion expressed, that if the steamer had put her helm a-port on first seeing the Niagara's lights, no collision would have taken place; the assessors will bear in mind, that the question is not merely whether if she had so done the collision would have been avoided, but whether she was bound so to do by any rule of seamanship or navigation, so as to throw the responsibility of the collision upon her. Upon the points submitted for the professional opinion of the assessors, the Court can have no

(*c*) Ch. J. Shaw, in *Sproul v. Hemmingway*, 16 Pick (Mass.), 1. (*d*) 50th sect. of By-laws made 12 April, 1850.

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desire to influence their opinion, or to express one of its own; all that it wishes is, that no material part should be overlooked by the assessors, and that their opinion on the points submitted should be as definite as in a complicated case of this nature it is possible it should be; and that on each point the assessors should endeavour to say which vessel, if either, or if any was in fault; or that no one was, if such be their conviction. The Court, therefore, directs that the questions be re-considered, and more definitely answered.

The assessors afterwards (27th May), made the following report:—

“1. The look-out man states that he saw the steamer Providence about twenty minutes before the collision, but no precautions were taken by the Niagara to avoid her, until the steamer was so close, that notwithstanding the Niagara answered her helm quickly, she grazed the after-part of the steamer with her martingale. From this, one of two things is evident:—either the pilot or officer in charge of the deck did not see the steamer Providence in time to avoid her, in which case there was a want of proper look-out; or, if he did see her, there was great carelessness shown in approaching so close to her when he had plenty of room, and might have passed either to the northward or southward of the steamer and her tow. The evidence given by Charles Nolet, a third party and a calm spectator of the collision, is of much importance. He says, ‘and the witness believes that the steamer was not perceived by the Niagara until too late; because he is certain that if she had been seen in time by the Niagara, and had then the necessary measures been taken, the collision would have been easily avoided.’

“2. We believe that the Niagara was steering a little to the south shore in order to pass the Hampden on the

starboard side; but in so doing there was nothing to prevent her (the Niagara) keeping a bright look-out, and taking proper measures to avoid lights that might have been seen a-head.

"3. When the pilot appears to have seen the danger of collision, the only thing that could be done at that time, was putting the helm of the Niagara a-starboard.

"4. The Elizabeth followed the rules laid down for vessels meeting each other; and it would have been well for all parties if her tug had set her the example in porting her helm in time. Be this as it may, it is pretty clear, that if a tug tries to pass on one side of a vessel, and her tow tries to pass on the other side, without either cutting, slashing, or letting go the tow-rope, a collision will inevitably take place. If it was supposed by those on board of the Elizabeth that a collision was unavoidable, then they did right in porting their helm, in order to get the shock on the strongest part of the vessel.

"5. There was no want of seamanship shown on either side, but a great want of caution on the part of the Niagara. It should be imperative on all vessels, particularly steamers from the quickness of their motions, that they be strictly compelled to carry their lights according to law, which would in all cases determine two very essential points: first, that she is a steamer; secondly, how she is steering,—the latter a most important point, which generally can be easily determined when proper lights are carried; that is to say, a red light at the bow, and a white light at the mast-head or flag-staff (see the 50th Trinity House bye-law), which regulation the steamer Providence did not comply with at the time of the collision. It appears to us that if the steamer Providence had been keeping a good look-out, and had immediately put her helm a-port, which she was bound to do on first perceiving the Niagara, no collision would

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have taken place. In conclusion, we are of opinion that the Niagara is responsible for the damages done to the Elizabeth."

THE COURT.—The professional gentlemen by whom I have been assisted in this case are of opinion, and I concur with them, that the Elizabeth is not chargeable with any misconduct or mismanagement as regards the circumstances which led to the collision. Even with respect to her porting her helm when the Niagara was close upon her, those gentlemen think that she was fully justified, if she thought the collision inevitable, and only wished to make it as harmless as possible. That this was the opinion of those on board her is clear from the evidence; their only hope then was that the Niagara might pass between the Elizabeth and the steamer, and a man was ready on board the Elizabeth to cut the tow-rope if necessary. I also concur with those gentlemen in thinking, that there was sufficient neglect or misconduct on the part of the Niagara to make her liable to the owners of the Elizabeth for the damages resulting from the collision. There was no proper and sufficient look-out on board the Niagara, nor were the proper means adopted for avoiding collision after the time when the steamer's lights were seen by the Niagara over her starboard bow. Her having adopted the most seamanlike and proper course when the collision was all but inevitable, does not exempt her from responsibility.

Neither in the pleadings, nor in the evidence, is there any allegation that the fault was with the steamer. It may be possible that if she had ported her helm at a very early period and gone to the northward, the vessels might have passed clear; but there was then evidently sufficient room for them to pass clear without her doing so, and it is far from improbable that her doing so might

have brought her into contact with the Niagara, as the steamer's people assert; and if she had done so and mischief had ensued, she might have been liable; for as is correctly said by Chief Justice *Best*, "Although there may be a rule of the sea, yet a man who has the management of one ship is not allowed to follow that rule to the injury of the vessel of another, when he could avoid the injury by pursuing a different course" (e). Although there may be some discrepance in the evidence on this point, yet I see nothing to justify my concluding that there was not a sufficient look-out on board the steamer. As regards her lights, I incline to think that she complied substantially with the Trinity House rule (f), as far as circumstances allowed. She had the bright red light in the bow, and a bright white light over each paddle-box. It does not appear that she had any mast, and being engaged in towing, it may be that she could not carry a flag-staff at the stern without its being in the way of the tow-rope; and if so, she seems to have done all that could be expected under the circumstances, towards obeying the rule by carrying white lights on each side sufficiently high to be seen over the paddle-boxes. In point of fact, the Niagara's people saw these lights; and even supposing them to have been insufficient, the accident did not arise from such insufficiency. Unless it appeared that the accident arose exclusively from the misconduct of the steamer, the responsibility could not

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(e) *Handyside v. Wilson*, 3 Carrington & Payne, 538.

(f) That all steamboats, whether at anchor or under way in the River St. Lawrence, within the Port of Quebec, shall at night show a bright red light in the bow, and a bright white light at the mast-head, and if any such boat has no mast, the white light

shall be on the stern sufficiently high to be seen over the paddle-boxes; under a penalty not exceeding ten pounds currency, to be recoverable from the master or other person in charge of such steamboat, for every contravention of this regulation.—50th sec. of By-laws, made 12th April, 1850.

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be transferred to her, so as to relieve the other vessels. I am not called upon, in the present case, to do more than pronounce judgment as between the Elizabeth and the Niagara; nor will my judgment prevent the recourse of either against the steamer, if the fault were exclusively hers,—a point which is certainly not established by evidence in the present suit. The judgment is, therefore, in favour of the Elizabeth, and against the Niagara.

From this judgment the owner of the Niagara asserted, on the 14th instant, an appeal to Her Majesty in Her Privy Council.

Alleyn, for the Elizabeth.

Stuart and *Vannorous*, for the Niagara.

Tuesday, 21st November, 1854.

NEW YORK PACKET—MARSHEAD.

Harbour Master has authority to station all ships or vessels which come to the harbour of Quebec, or haul into any wharf within the same, and to regulate the mooring and fastening, and shifting and removal of such ships or vessels.

Owner of vessel contravening harbour master's order, condemned in damages for a collision.

Vessel moored alongside of another at a wharf in the harbour of Quebec, made responsible to the other for injuries resulting from her proximity.

NEW YORK
PACKET.

The present action was brought by the owner of the ship Storm King, against the bark New York Packet, for damages occasioned by a collision in the harbour of Quebec, on the 21st of June last. The judgment given in the case was as follows :—

THE COURT.—*Hon. Henry Black.*

The rules of the Trinity House of Quebec provide that the Harbour Master of Quebec shall station all ships and vessels which shall come to the harbour of Quebec, or any part thereof, or haul into any of the wharves within the limits of the said harbour, and shall regulate the mooring and fastening, and shifting and removal of such ships and vessels, and shall determine how far and in what instances it is the duty of masters and other persons having charge of such ships or vessels, to accommodate each other in their respective situations, and all disputes which may arise touching or concerning the premises or any or either of them. And any master or other person having charge of any ship or vessel, who shall refuse or neglect to obey the directions of the said

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Harbour Master in the premises, or in any or either of them, and any wharfinger or other person who resists or opposes such Harbour Master in the execution of the duties thereby required of him, or of any or either of them, shall for each and every such offence incur and pay a penalty not exceeding ten pounds currency.

This being the law of the Harbour, it appears that on the 21st June last, the barque New York Packet was lying at Gillespie's wharf, in the harbour of Quebec, in a berth usually and properly assigned to a line of steamers, of which the Lady Elgin is one. In the afternoon of that day, the Lady Elgin having arrived, and it being necessary that the New York Packet should quit the berth so occupied by her, in order to allow the Lady Elgin to come into it; the master of the New York Packet applied to the Harbour Master, Captain Armstrong, telling him that he knew he had no right to retain the berth then occupied by his vessel, and requesting him to assign her a berth in the dock between Gillespie's wharf and St. Andrew's wharf, the next wharf above it. The Harbour Master had also been applied to on the same day by the agent of the Lady Elgin to have the New York Packet removed out of the Lady Elgin's berth. At about five o'clock the same afternoon, the Harbour Master went to the spot, and having caused the steamer Lord Sydenham—which then lay across the space between the two wharves so as to shut up the dock between them—to heave ahead, and to make an opening for the New York Packet to enter; the New York Packet was then, under his directions, hauled into the dock, and being placed in a diagonal direction with her larboard bow resting against the side of the Bremen ship Adlar, or Eagle, her starboard side about midships, resting against the larboard quarter of the Marie Celina, and a warp from her starboard bow, and another from her starboard quarter being made fast to the upper and outward

corner of Gillespie's wharf, to prevent her either swinging or going ahead. The Harbour Master considered her safely moored for the night, and told the master so, distinctly charging him not to attempt to move his vessel further ahead, because there was not room enough between the two wharves for his vessel, the two others which have been mentioned, and the Storm King, which was lying in the dock at Gillespie's wharf, and inside of the Marie Celina. It was then very little after high water. It appears that St. Andrew's and Gillespie's wharves are built with very considerable batter, so that the space between them at the bottom is less, by about eight feet, than at the top.

After the Harbour Master's departure, the master of the New York Packet hauled his vessel forward until she lay between, and parallel to the Adlar and Marie Celina, the Storm King being inside the latter, which there was then just room enough for him to do. He requested the people of the Marie Celina to haul ahead, but they declined, and in so doing were backed by the master of the Storm King, out of which the Marie Celina was receiving cargo, and who protested against any attempt to move the Marie Celina, which would put him to considerable inconvenience. In this position the vessels lay with the tide ebbing out, and as the water fell in the dock, and the space between the wharves, at the water level diminished, they became tightly jammed together, so that it was then impossible to move them; and as the water continued to fall, the pressure became so great that the Marie Celina was completely crushed, and the Storm King was suspended between the Marie Celina and the wharf, and thrown over nearly on her beam ends: both vessels, but more especially the Marie Celina, which was the smaller and the weaker, receiving very great damage.

To recover the damage done to the Storm King the present action is brought. The chief ground of defence

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is the refusal of the *Marie Celina* to heave ahead as requested to do so by the *New York Packet*, and that of the *Storm King* to allow her to do so. But the berths which these vessels occupied had been assigned or confirmed to them by the only competent authority, that is, the Harbour Master; who did not think proper, under the circumstances, to direct the *Marie Celina* to move ahead. Nor does it appear that the master of the *New York Packet* applied to the Harbour Master to direct the *Marie Celina* to heave ahead: on the contrary the Harbour Master expressly directed the *New York Packet* to remain in the position she then occupied for the night, warning the master at the same time of the damage which would be incurred if he attempted to haul further in. It is in evidence that the night was calm, that there was no appearance of bad weather, and that the Harbour Master considered the *New York Packet* perfectly snug till the morning. Since, under these circumstances, the *New York Packet* chose to set at naught, not merely the opinion but the positive injunction and warning of the Harbour Master, and thereby occasioned a very great damage to vessels which were in nowise in fault, and which contravened no order or rule of the harbour, it is only right that the *New York Packet* should bear the loss, which her violation of the Harbour Master's order brought upon innocent parties; and, therefore, however unfortunate it may be for her owner, I am of opinion that he must be made responsible.

It is evidently necessary, for the good of all, that there should be some officer clothed with sufficient authority to decide promptly all questions as to the berths or positions which vessels may occupy in a crowded harbour like that of Quebec; and this authority the Legislature, acting through the Trinity House, has devolved upon the Harbour Master. Any contravention of such authority must manifestly tend to general loss and inconvenience,

and often to great damage, as the contravention of which the New York Packet was guilty in the present instance has done. Had she suffered injury herself, or occasioned injury to others by obeying instead of contravening the Harbour Master's orders, she might have been blameless, however great the damage occasioned. The order of the Harbour Master, in such case, would have been her defence, as it now forms the ground of her condemnation (a).

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From the decree of the Court the owner of the New York Packet asserted an appeal to Her Majesty in Her Privy Council, and gave the usual bail.

Stuart and Vannovous, for Storm King.

Sol.-Gen. Ross and Edward Jones, for New York Packet.

(a) A vessel which moors along-side of another at a wharf or elsewhere, becomes responsible to the other for all injuries resulting from her proximity, which

human skill or prevention could have guarded against. *The Lake*, 2 Wallace's Reports, C. C. of U. S. for third circuit, p. 52.

Saturday, 10th March, 1855.

ELECTRIC—MOLTON.

ELECTRIC.

In a case of very meritorious service rendered by two seamen and two young men to a vessel in the river St. Lawrence, the Court awarded one-sixth part of the property saved, and also their costs and expenses.

This was a cause of salvage, promoted by Edward Hovington and Malcolm Hovington, and by Hubert Fraser on behalf of his minor sons Daniel Fraser and Elzéar Fraser, for services rendered to the barque Electric, stranded on Red Island shoal to the eastward of the island, on her homeward voyage in November, 1853. The circumstances of the case are fully noticed in the following judgment.

JUDGMENT.—Hon. Henry Black.

The Electric, John Molton, master, sailed from Quebec, on the 17th November, 1853, on a voyage to Bideford, a sea-port in Devonshire in England, and proceeded down the river St. Lawrence as far as Red Island, about one hundred and forty miles below Quebec. On the evening of the 22nd November, she grounded on Red Island shoal, to the eastward of the island, the weather being at that time more than usually inclement, and the ice forming round her and upon her, so as to prevent her from being worked, or moving. Notwithstanding the efforts of the master and crew, she remained fast during the 23rd, 24th, 25th, 26th and 27th. On the last mentioned day the master and crew left the vessel, being no longer able to endure the cold and the hardships to which they were subjected, some of them being disabled by

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sickness proceeding from these causes. A pilot of the name of Thomas Simard, who had come to their assistance, and had been with them in the vessel, also landed with them. The crew were taken to the light-house on the island, where they remained over night. On the 28th the vessel was carried off by the ice with the ebb tide, and had drifted down the river some distance, when the master and several of the crew, and this pilot, made two or three fruitless attempts to cut their way through the ice to the vessel. They then, under the advice of the same pilot, left the island, and crossed over to the parish of Green Island, on the main land, on the south side of the St. Lawrence, the master declaring that he believed any attempt to get to the vessel was hopeless, and thinking it possible that she might drift across the channel to Green Island. At about five o'clock the same evening, Edward Hovington and Malcolm Hovington, two seamen, the former about twenty-four years of age, and the latter about nineteen, who had come over from Tadousac, on the north shore of the river, to Red Island, for the purpose of rendering assistance to the Electric, proposed to Daniel Fraser and Elzéar Fraser, two young men, the one nineteen, and the other about fourteen years of age, to go off in a boat belonging to the Hovingtons, in pursuit of the vessel, and to make an effort to go on board, and save her if possible. They all agree, and accordingly leave Red Island about five o'clock in the evening, and by great perseverance, courage, and skill, and with great peril of their lives, they force their boat through the ice, and succeed in getting on board in about two hours after they had left the island, the vessel being then about three miles below Red Island, surrounded by the ice, and drifting with it and the tide. They find the hull of the vessel and deck covered with ice, the sails and rigging frozen stiff, so that it was very difficult and dangerous to attempt to navigate her, or to do anything with her. The

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wind was then strong from the south-west or down the river, the night dark, and the weather very bad, with squalls and snow storms, and great cold; and they remain on board during the night. The vessel had drifted down about eighteen miles below Red Island, or nearly opposite the Esquamine islets, when about three o'clock in the morning the wind first slackened, and then changed to the north-east, with a moderate breeze, the ship nevertheless being always surrounded by ice. Taking advantage of this favourable opportunity, the salvors with some difficulty managed to set the sails, and direct their course up the river. Notwithstanding the difficulty of steering the vessel, the knowledge the Hovingtons had of the river, enabled them to avoid several very dangerous places, and finally to get the ship into Tadousac Bay, where they made her fast, and then stored away on shore her sails and rigging. The vessel was anchored, and remained afloat all the winter, and until she was delivered to the owner in the following spring, and proceeded on her voyage. It appears that in saving the vessel the Hovingtons lost their boat, which was crushed in the ice, and that the parties were engaged in the salvage service about nineteen or twenty hours; and the daring courage and skill exerted by the Hovingtons especially, were very great.

The only question to be determined is the amount to which the salvors are entitled. The several attempts at compromise, and conversations between the parties interested, which have been referred to in the evidence, amount in law to nothing; and against those parts of the evidence which tend to decry the value of the services rendered by the salvors, the Court is bound to take into consideration the fact that the protest made by the master, which would have contained a narrative of the facts when they were fresh in his memory, has not been produced; and that neither the master, the mate, nor any

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of the crew have been examined in the case ; although it may be fairly supposed that the protest, and the evidence of these men would have been the best evidence by which the Court could have been informed of the facts of the case, and of the circumstances under which the vessel was abandoned. According to the rules of proceeding in Admiralty Courts, the protest in such cases ought always to be produced ; and if it be not, the salvors are fairly entitled to the benefit of the inference that it is withheld because it would be too favourable to them. On this point the remarks and reasons of the present eminent Judge of the High Court of Admiralty, Doctor *Lushington*, in the case of the *Emma* (a) are conclusive.

The owner has paid into Court, since the action was brought 325% currency, as the salvage. This sum does not appear to the Court to be sufficient. The amount must be governed by considerations of the danger to the ship, value, risk of life, skill, labour, and duration of the service. The danger to the vessel was most imminent ; there does not appear to be any reasonable cause for believing that if no one had gone on board after the master, pilot, and crew had left her,—or if the sails had not been set, or if she had not been steered and managed with the greatest hardihood and skill,—she would ever have been saved, or have drifted into any place where the master and crew could have boarded her again. The value of the ship and cargo is admitted to be 8000%, currency. The risk of life incurred by the salvors must have been considerable, for they did what the master and crew had deemed it too dangerous to attempt ; and the skill and labour must have been great also, for the salvors accomplished what the master and crew, and pilot, had abandoned all hope of accomplishing. Such being the case the duration of the service is almost immaterial

(a) 2 W. Robinson's Rep. pp. 316-7.

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to the inquiry. It is the manifest interest both of owners and insurers or underwriters of vessels to encourage every attempt to save vessels, under circumstances like those which distinguish this case. The navigation of the river St. Lawrence, at the end of the month of November, is well known to be exceedingly difficult and perilous, and in 1853 it was more than usually so. There was no obligation on the part of the young men to risk their lives in the attempt to save the vessel, more especially as there was not a living being on board, and therefore property only, and not life, was to be saved. They were only emboldened to risk their own lives by the hope of a liberal recompense if their enterprise succeeded. If they had failed they would have got nothing, and might have been lost or maimed in the attempt. Taking this view of the case, I think it just and right, and at the same time for the interest of the trade, and the general encouragement of similar efforts, that the salvors should receive one-sixth part of the property saved, or 500*l.* currency, together with their costs and expenses. Of the 500*l.*, I award three-fifths to the Hovingtons, making 150*l.* each, and two-fifths to the Frasers, making 100*l.* each.

Sol.-Gen. Ross and Gauthier, for salvors.

Stuart and Vannorous, for owner.

Tuesday, 3rd July, 1855.

THE INGA—EILERTSEN.

Merchant Shipping Act, 17 & 18 Vict. c. 104—Steam Navigation Act, 14 & 15 Vict. c. 79—Collision—Steamer and Sailing-vessel, respective duties of.

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By the Merchant Shipping Act (17 & 18 Vict. c. 104, ss. 296, 297) and the Steam Navigation Act (14 & 15 Vict. c. 79), as well as by the rule of the Trinity House of Quebec, where a steamer meets a sailing-vessel going free, and there is danger of collision, it is the duty of each vessel to put her helm to port, and pass to the right, unless the circumstances are such as to render the following of the rule impracticable or dangerous.

The circumstances of the case examined, and no sufficient excuse being found for not following the rule, a sailing-vessel condemned in damages and costs for putting her helm to starboard, and passing to the left of a steam tow-boat, thereby causing collision with the vessel in tow, the steamer and her tow coming down the channel nearly or exactly upon a line with the course of the sailing-vessel.

This was a cause of collision promoted by the owners of the barque Universe, in which they claimed compensation for damage sustained by that vessel, in consequence of being run into on her voyage from Montreal, on the 28th May, 1854, by a vessel called the Inga. The facts of the case sufficiently appear from the following opinion of the learned Judge.

THE COURT.—*Hon. Henry Black.*

The Inga, a Norwegian vessel of about 480 tons, had been lying in the harbour of Quebec, opposite the Lower Town market-place, and in the afternoon of the 28th May, 1854, got under weigh for the purpose of proceeding to the ballast ground, from two to three miles up the river. The tide was ebbing, and the wind a light breeze from the eastward, and she went up under sail. Between

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three and four in the afternoon she had nearly reached the place at which she intended to come to anchor. She had come up under her fore-sail, fore-top-sail, and main-top-sail; but having decided upon the place at which she was to anchor her main-top-sail was taken in, and she was proceeding under her fore-sail and fore-top-sail, the wind still light from the east, the tide ebbing, and the vessel having way enough to stem it, and to move past the land at the rate of from half a knot to a knot an hour. At the same time the steam tow boat, Lumber Merchant, was coming down the river from Montreal to Quebec, having the barque Universe, about 313 tons register in tow astern of her, with about 50 fathoms of tow rope. They were going six knots through the water, or about nine past the land with the tide. When the vessels came in sight of each other they were about a mile and a half or two miles apart, all three being somewhere about the centre of the channel; the witnesses examined on the part of the Universe saying that the Inga was a little to the north, or on the port-hand of the line on which the Lumber Merchant and Universe were proceeding; and the witnesses examined on the part of the Inga affirming, on the contrary, that the Inga was a little to the south of that line, or in other words that the Lumber Merchant and Universe were a little on her starboard bow. Both parties however agree that the vessels were nearly in a straight line. As they approached, the helm of the Inga was put a starboard which threw her head round towards the south. The Lumber Merchant and the Universe on the contrary put their helms a-port, which threw their heads also to the south, and the consequence was that the Lumber Merchant just cleared the Inga, leaving her on the port side; but the Universe and the Inga came into collision, the Inga's bow striking the port side of the Universe about the main rigging, doing considerable damage to both vessels. At the time of the collision the

tow rope broke near the steamer's tow post. The vessels were afterwards cleared, and to recover the damage sustained by the Universe the present action is brought by the Inga.

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The only questions to be decided in order to ascertain whether the action is well or ill-founded are, whether the Inga in putting her helm a starboard was justified by the rules and customs of navigation, or whether she ought rather to have kept her course or put her helm a-port; and whether the Lumber Merchant and Universe did right in porting their helms.

The great increase of trade in the river St. Lawrence and in the inland navigation of the province, and more especially in the number of steam vessels and of vessels towed by steam vessels, renders it of great importance that some clear and definite rule should prevail as to the course which should be adopted by such vessels when going in opposite directions, and so placed that if each continue her course there would be danger of collision. The recognised rule for sailing vessels has always been that if both vessels have the wind fair, each vessel should port her helm so as to pass each other on the port hand: that if both vessels were close hauled, the one on the starboard tack should keep her course, and the one on the larboard tack should give way. This, as was lately very clearly remarked by the learned and able Judge *Sprague* of Boston in a judgment given by him in September last, in the case of the *Osprey* (a) is in reality the same rule qualified by the other perfectly well understood rule, that neither vessel is bound to port her helm, if by so doing she would either run into direct danger or would cease to be under command; for, if the vessel on the starboard tack close hauled were to port her helm, she would be thrown into the wind and cease to be under

(a) 7 Law Reporter, 384.

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command; whereas the vessel on the larboard tack by porting her helm goes off from the wind, and is perfectly under command. The old rule was also that if one vessel had the wind large or free, and the other was close hauled, the one being close hauled should keep her course, and the other should port her helm and give way. The reason being obviously that the close hauled vessel would suffer much more inconvenience by giving way, and falling to leeward, than the other which having the wind free could immediately regain the line on which she had been proceeding. The rule therefore was in substance that vessels meeting as stated, should each port her helm, unless one of them by so doing would either run into danger or be put to much greater inconvenience than the other.

When steamboats came to be generally used, their power of proceeding in any direction without regard to the wind, placed them always in the same condition as a vessel proceeding with the wind free, and accordingly the custom seems to have been so to regard them. On the 30th October, 1840, the Trinity House of London made a regulation that "when steam vessels on different courses must unavoidably or necessarily cross so near that by continuing their respective courses there would be a risk of coming in collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other. A steam vessel passing another in a narrow channel, must always keep the vessel she is passing on the larboard hand (b)." And the preamble to this rule recites that steam vessels "may be considered in the light of vessels navigating with a fair wind, and should give way to sailing vessels on a wind on either tack," and that "it becomes only necessary to provide a rule for their observance when meeting other steamers or sailing

(b) See the Rule, 1 W. Rob. 488.

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vessels going large." Notwithstanding this recital the rule does not in direct terms apply to steamers meeting sailing vessels, and it was so held by Doctor *Lushington*, in the case of the *City of London* (c) decided on the 24th April, 1845: but the considerations in the preamble of the rule were adopted by that learned Judge as consistent with the common law, with sound reason, and with the established rules of navigation; and he held accordingly that a steamer should be regarded as a vessel proceeding with a fair wind, when meeting sailing vessels. The rule of the Trinity House of Quebec, made on the same subject, on the 12th April, 1850, was in spirit the same as that of the Trinity House of London; and on the 31st March, 1854, the Trinity House of Quebec passed a further regulation meeting the precise case omitted in the English rule, and directing "that sailing vessels with a fair wind, and steam vessels when meeting within the port of Quebec, shall port their helm and draw to the starboard, passing each other on the larboard hand." This rule, as before observed, is only the application of the doctrine that steamers shall be considered as vessels having the wind fair. Between the dates of the two Quebec rules, the English Steam Navigation Act (14 & 15 Vict. c. 79) was passed (d), and the 27th sect. provides that "Whenever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master or other person having charge of either such vessel perceives that if both vessels continue their respective courses they will pass so near as to involve any risk of a collision, he shall put the helm of his vessel to port, so as to pass on the port side of the other vessel, due regard being had to the tide and to the position of each vessel with respect to the dangers of the channel, and as regards sailing vessels, to the keeping of each vessel

(c) 4 Notes of Cases, 40.

(d) 7th August, 1851.

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under command: and the master of any steam vessel navigating any river or narrow channel shall keep as far as is practicable to that side of the fair-way or mid-channel thereof which lies on the starboard side of each vessel." This rule applies to all vessels without distinction, whether impelled by steam or by sails. Each vessel is to port her helm; the only exception being when by so doing she would be brought into danger, or if a sailing vessel the command over her will be lost. This it is evident is only the old rule and reasoning thrown into a general form and made applicable to all cases. The 296th and 297th sections of the British Shipping Act, which was passed on the 10th August, 1854, and came into force on the 1st May last (17 & 18 Vict. c. 104) contains the following enactment on this subject:—

"Whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port so as to pass on the port side of each other; and this rule shall be obeyed by all steamships and by all sailing ships, whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and, as regards sailing ships on the starboard tack close hauled, to the keeping of the ships under command.

"Every steam ship, when navigating any narrow channel shall, whenever it is safe and practicable, keep to that side of the fair-way or mid-channel, which lies on the starboard side of such steamship."

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The rules here given are in substance precisely the same as before, though given in other language, and more general and perhaps more definite terms. The rule is as before, that each vessel shall port her helm, unless she would incur danger by so doing, or the command over her would be lost. The British and the Canadian rules are therefore the same, and though that portion of them which relates to the meeting of steamers and sailing vessels does not appear to have been formally enacted in direct words until recently; yet, as we have seen, it has been always recognised and adopted as reasonable and as consistent with the long established rules of navigation. The same rule seems to prevail in the United States, except that as appears in the case of the Osprey, and the cases therein referred to, our neighbours incline to give greater extent to that portion of the old British rule which favours the vessel which would be most inconvenienced by porting her helm, and to hold that as a steamer has greater command over her motions than a sailing vessel with a fair wind, she ought to give way to such sailing vessel; and that the latter ought to keep her course without porting her helm, leaving the duty of turning aside so as to avoid the collision solely to the steamer. I am not called upon to decide whether the English or the American interpretation of the old rule would be the best to adopt; first, because the Canadian and English rule must prevail in our waters; and secondly, because in the case before me the Inga did not keep her course, but starboarded her helm. The English rule has, however, the advantage of being more certain, and more easily remembered; and it does appear to me that there must be less danger of collision, and that the vessels can get out of each other's way in less time if both draw to starboard, by porting their helms, than if one stands still, and throws the whole burthen of the movement upon the other.

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I think, then, that in the present case each vessel was bound to put her helm to port, unless there were some peculiar circumstances in the case which made it dangerous so to do, or rendered a deviation from the rule necessary or justifiable. Now, it appears that both the Inga and the steamer were perfectly under command, each had sufficient way to make her obey her helm immediately. By the evidence of the Inga's own people it would seem that she was, if at all, very little to the starboard side of the steamer and her tow; so little indeed that the master of the Inga himself admits that it was necessary to starboard the Inga's helm in order to get sufficiently out of the line of the steamer and her tow, to enable them to pass safely on the starboard side. On the other hand it is denied by the witnesses for the Universe that the Inga was at all to the southward; and it is certain, from what took place, that if the Inga had ported her helm, or even perhaps if she had continued in her course the collision would have been avoided; for, the Inga's people say that her helm was starboarded about two minutes before the collision, and in two minutes she must clearly have run more than half the length of the Universe to the southward; and if she had been half the length of the Universe less to the southward than she was at the time of the collision, it is equally clear that she would not have struck that ship; and if she had ported her helm she would have gone to the northward, and been still further out of danger: and even if the collision would not have been avoided the Inga would not have been in default, and would not have been responsible for the consequences. The case is not one of a sudden *rencontre* where there is no time for consideration; the vessels were undoubtedly seen by each other, at least ten minutes before they met (e). Neither is it a

(e) See the case of the General Steam Navigation Company v.

case where there was any danger to either in obeying the rule ; the channel was wide enough, and both could have drawn to the starboard without risk of touching the ground or of encountering any other damage ; and both were in charge of pilots who were bound to know the rules of the Trinity House and of the river. Under these circumstances I can have no hesitation in giving effect to a definite and easily observed rule, which appears extremely well adapted to insure safety ; and in deciding that the collision arose from the failure of the Inga to obey it.

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Stuart and Vannorous, for Universe.

Edward Jones, for Inga.

Mann, tried before Sir Frederick
Pollock, Lord Chief Baron of the

Exchequer, at the Summer As-
sises at Croydon, 1853.

Friday, 13th July, 1855.

JOHN COUNTER—MILLER.

JOHN COUNTER. COLLISION.—Liability of a steam-boat for collision between vessels one of which is towed by the steam-boat.

This case involved the question of the liability of a steamboat towing a vessel, for damage and injuries caused by the vessel in tow coming in collision with another vessel. The facts will be found stated in the following opinion of the Court.

JUDGMENT.—*Hon. Henry Black.*

On the 22nd September last, the brig William Wilberforce, was lying at anchor on the ballast ground in the harbour of Quebec, well over to the north side of that place, and about the middle of the channel of the River St. Lawrence. A barque was at the same time lying at the ballast ground about two cables' length to the northward, or towards the Quebec shore, and a little lower down the river or astern of the brig. The wind was light from the south-west or down the river; and the tide was ebbing at the rate of about four miles an hour. At about two o'clock in the afternoon the steamer John Counter, belonging to the Wolfe Island Railroad and Canal Company, on her way from Montreal with the barges Onward and Utility in tow, rounded Pointe à Pizeau, and came in sight of the brig. From the evidence both of the pilot and master of the steamer, and of the people of the barges, it appears that they saw the

brig and the barque when they were about two miles distant. The only discrepancy as to the position of the vessels is, whether when the vessels were just within sight of each other, the steamer was on the port or on the starboard side of the brig. All the witnesses, however, agree that there was plenty of room and time for the steamer and her tows to pass to the south of the brig or on the port side, where there was nothing between the brig and the south shore.

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The pilot of the steamer being of opinion that he could pass safely between the brig and the barque, and wishing, as he says, to save a certain distance in getting to the wharf, at which the steamer usually lay, determined, with the consent of the master, to make the attempt, and the steamer's helm was therefore put a starboard, which inclined her bow to the north shore; and she cleared the brig by about the steamer's breadth. The barge Onward, which was about eighty or a hundred feet astern of her did not clear the brig, but the barge's starboard side about midships struck the bow of the brig; the second barge (Utility) being about fifty or sixty feet astern with her stem struck the brig's larboard bow, the tow rope broke, and she swung alongside the brig. At the time of the collision the steamer and her tows were running down the river, with steam and tide together, at the rate of from ten to twelve knots, the barges being light. It does not appear that at the time the steamer's helm was put a starboard, any special direction was given to the barges, as to how they should steer, though the people of the steamer assert that they had been carelessly steered all the way down from Montreal.

From the circumstances of the collision it appears that the steamer really was, as is asserted by the witnesses for the brig, on the larboard or south side of the brig, when her pilot and master determined to endeavour to pass between the brig and the barque, and put her helm

JOHN COUNTER. a starboard for that purpose; and that she really did, as the same witnesses say, cross the bows of the brig. The tide was then running strong down, and the steamer and her tows were, of course, swept down with it. The action of the steamer, after her helm was so put a starboard, was to carry herself and to draw the barges to the northward, or starboard side of the brig. The steamer being the foremost was carried sufficiently far in that] direction to pass the brig, by rather more than her own breadth, but the Onward being eighty or a hundred feet astern had not drawn sufficiently to the northward before the tide had carried her down as far as the brig, and she consequently struck the brig's bow with her starboard side. The Utility being fifty or sixty feet still further astern, would of course be carried still further down the river before she could get on the line of the brig, and we accordingly find that she struck the larboard side of the brig with her stem, when the tow-rope broke, the brig being between her and the steamer. The facts in the evidence thus agreeing with the circumstances which must have taken place, if the steamer crossed the brig's bow, as is asserted by the witnesses on behalf of the brig, convinces me that this assertion is correct, and that the steamer really was to the southward of the brig when she determined to pass to the northward of her (a). It would seem, therefore, apart from other circumstances that the determination was rash and hazardous, and that the steamer ought to be responsible for any attempt to carry it into effect.

But even supposing that at the time when the brig was first seen from the steamer, the steamer was either in a

(a) The Court will not enter into the discussion as to the precise point whether on the starboard side or otherwise in which one vessel lies to the other at the time of being discovered. (See opinion of Dr. Lushington in the case of *The Rose*, *Gilmore*, 1 W. Rob. 1, and in the case of *The Columbine*, *Norwood*, *ibid.* 33.)

straight line with the brig, or a very little to the north of her, which is the utmost that the witnesses for the steamer state; yet, they also admit that they saw her when she was at the distance of three-fourths of a league or two miles; and there is no attempt to say or to show that there was not plenty of room to pass to the south of the brig, and so to obey the spirit of the rule of the Trinity House of Quebec (*b*), by passing the brig on the larboard hand. Instead of doing this, the people of the steamer preferred, for the sake of saving a trifling distance, to run the risk of passing between the brig and the barque. They themselves assert that the barges had been wildly steered all the way from Montreal; and they therefore knew that, even if great skill in steering the barges would enable them to execute the manœuvre with impunity, they could not depend on any such skill being used: nor did they give any special directions as to how the barges should be steered, but left them to do as they had previously done. The steamer and her tows had just rounded the Pointe à Pizeau, and in so doing had avowedly inclined their course as they must have done towards the south side of the river, and the impulse of the barges was in that direction, in which the wind also carried them. They could not change their direction as easily as the steamer could; nor could they know that it was the intention of the steamer to pass on the starboard side of the brig. On the contrary, they were justified in supposing that she would pass by the clear channel; and on the south or port side of her, as I think, under the circumstances of the case, she was bound to do. If for the sake of some expected saving of distance or trouble, she chose to take the short and dangerous course, she must bear the consequences resulting from it. The barges

JOHN COUNTER.

(*b*) Rule of 31st March, 1854.

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had no power to do otherwise than follow in the best way they could; and having no intimation of her intended change of course, they could not be blamed even if,—which does not appear,—they did not follow her so quickly as they might have done, if they had been forewarned of her intention, and directed what to do.

The brig was at anchor, and therefore no blame can be imputed to her, and she was seen far enough off to allow ample time to avoid the collision, and there was ample room to do so; and therefore it cannot be said that the accident was unavoidable. The collision was the fault of those who had the power of avoiding it as the steamer undoubtedly had: and there is no proof that the barges or either of them had any such power. Cases may occur in which an accident may arise from the fault of the tow, without any error or mismanagement on the part of the tug, and in such case the tow alone must be answerable for consequences. Cases may also occur in which both are in fault, and in such cases both would be liable to the injured vessel, whatever might be their responsibility *inter se* (c). The present case is not any of these; the manœuvre which caused the accident was the spontaneous action of the steamer herself, compelled by no necessity of circumstances, and adopted solely for her advantage. There was a course open to her in which no damage could have occurred; one which it would have been easier and straighter for her to take after rounding Pointe à Pizeau; which would have been more consistent with the spirit of the Trinity House

(c) Opinion of Ch. J. Lemuel Shaw, of the Supreme Court of Massachusetts, 25th March, 1833, in *Sproul v. Hemmingway*, 1 Pickering's Reports, p. 1. Opinion of Judge Betts in the case of the steam tug-boat *Express*,

26th Feb. 1846, and that of Judge Nelson, one of the justices of the Supreme Court of the United States, on appeal in same case, 12th November, 1848, 6 Law Observer, pp. 435, 401.

rule, and the usages of navigation, and which the persons in charge of the barges would naturally expect that she should take. For her own benefit she chose another and more difficult passage, and her owners must bear the consequences of her error.

JOHN COUNTER.

Stuart and Vannovous, for the brig.

Jones, for the steamer.

Friday, 24th August, 1855.

MARY BANNATYNE—FERGUSON.

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1. Where two ships, close hauled, on opposite tacks meet, and there would be danger of collision if each continued her course, the one on the port tack is to give way, and the other is to hold her course.

2. She is not to do this, if by so doing she would cause unnecessary risk to the other.

3. Neither is the other bound to obey the rule, if by so doing she would run into unavoidable or imminent danger; but if there be no such danger, the one on the starboard tack is entitled to the benefit of the rule.

4. The circumstances of the case examined, and no sufficient excuse being found for not following the rule, the vessel inflicting the injury condemned in damages and costs.

This suit was brought by the owners of the barque *St. John* against the barque *Mary Bannatyne*, to recover damages occasioned by a collision. The injury occurred on the 17th of June last, in the river *St. Lawrence*, a few miles below the island of *Bic*. The facts of the case sufficiently appear in the following opinion of the Court:—

JUDGMENT.—*Hon. Henry Black.*

On the night of the 16th and morning of the 17th June last, the barque *St. John*, of the burthen of 573 tons, *David Blyth*, master, and the barque *Mary Bannatyne*, of the burthen of 535 tons, *James Ferguson*, master, were in the river *St. Lawrence*, a few miles below the island of *Bic*; both were bound to *Quebec*, and the wind being adverse, they were both beating up, and close-hauled. They had seen each other on the 16th, and for several days before. It appears, also, that in the day-time of the 16th the two vessels crossed each other, passing within

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about 100 yards of each other, the St. John being then on the port tack, and the Mary Bannatyne on the starboard tack, the St. John giving way a little to allow the Mary Bannatyne to pass freely: and it is in evidence that they had seen many vessels also bound to Quebec, and beating up the river within sight of them. They continued beating up, and on the night of the 16th the St. John was running on the port tack towards the north shore until midnight, when the master came on deck, and had the ship put about, standing towards the south shore, on the starboard tack; on which she continued until the collision. The Mary Bannatyne, which had been on the starboard tack on the night of the 16th, also tacked about midnight, and stood towards the north shore, on the port tack; both vessels continuing close-hauled. The wind at this time was a whole-sail breeze, driving the vessels about six knots an hour, and both were under perfect command. Both vessels appear to have had a sufficient crew, and a sufficient number on watch, and each is alleged by her own people to have had a light at her bowsprit end; but the people of each deny that they saw any light on board the other vessel. The people of the St. John saw the Mary Bannatyne when at a distance of two miles and a half or three miles off, and do not appear to have lost sight of her up to the time of the collision. It is proved on her part, that her master, finding that the Mary Bannatyne was not giving way, and that the vessels were approaching each other, caused a light to be displayed on the port quarter of the St. John; and as the vessels neared each other, hailed the Mary Bannatyne to port her helm, and continued to do so as loud as he could until the vessels touched each other; at the same time he ordered the man at the wheel to keep the ship as close to the wind as possible without getting into the wind, or losing command of her.

It is acknowledged on the part of the Mary Bannatyne

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that she did not port her helm until she was within so short a distance that although she obeyed her helm, and went off the wind, yet it was too late to avoid the collision, and her stem struck the *St. John* on her port side, in the middle of the main rigging, her bowsprit running through the main-sail of the *St. John*, carrying away the main rigging and back stays, and everything belonging to the mizen mast, and doing the other damage complained of. After the collision the vessels separated.

The wind was between north and north-west, and it is admitted on both sides that the weather was generally clear, with showers of drizzling rain. The people of the *Mary Bannatyne* say in their defence that this rain obscured the weather to such an extent that it was not possible for them to see the *St. John* at a sufficient distance to avoid the collision, although there was a man expressly stationed on the fore-castle as a look-out;—and this is, in fact, the whole amount of the defence. But, though the man who was at the wheel of the *Mary Bannatyne* when the accident occurred (Patrick Crahan) says, “that the most vigilant look-out could not, with the hazy and rainy weather which was experienced during the twenty minutes immediately preceding the collision, have seen a vessel to leeward at a greater distance than twice her length,” yet all the other witnesses produced on behalf of the *Mary Bannatyne*, including the chief mate (James Watson), whose watch it was, state, that had the look-out been attentive he must have seen the *St. John* at a greater distance than he did; and we have in evidence, on the other side, that the *St. John*’s people saw the *Mary Bannatyne* at the distance of about two miles and a half; and this evidence is the less liable to suspicion, inasmuch as it makes against the *St. John*, if there were any fault on her part, as it goes to prove that she had plenty of time to adopt any course which circumstances required. Neither does there seem any reason

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why the Mary Bannatyne should not see the St. John as soon as the St. John saw her; for neither ship was, in point of fact, any considerable distance to leeward or to windward of the other, otherwise they could not have met. The man who is stated to have had the look-out (Christopher Callaghan) is not produced; neither is another man (George Brew), who is said to have been one of the watch on deck; and although it is alleged that they had deserted, yet it does not appear that any search was made for them, or any attempt to obtain their evidence: and this is the more to be regretted, inasmuch as the mate, and all the other witnesses of the Mary Bannatyne, except one, throw the blame upon the look-out man. On the other hand, the master and every one of the watch of the St. John were examined, and agree in their statements, which appear to have been fairly made. Besides admitting that he saw the Mary Bannatyne two miles and a half off, the master of the St. John admits that he could have avoided the collision by altering his ship's course, if he had foreseen that the Mary Bannatyne would not alter hers.

The undoubted rule of navigation is, that where two ships, close-hauled, on opposite tacks meet, and there would be danger of collision if each continued her course, the one on the port tack shall give way, and the other shall hold her course. She is not to do this if by so doing she would cause unnecessary risk to the other. Neither is the other bound to obey the rule, if by so doing she would run into unavoidable or imminent danger; but if there be no such risk, the one on the starboard tack is entitled to the benefit of the rule. In the present instance there was certainly no such risk, and if the Mary Bannatyne had kept a good look-out she must have seen the St. John in time to port her helm and avoid her, which she could very easily have done. There is no allegation on the part of the Mary Bannatyne

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of any want of skill or infringement of nautical rule on the part of the *St. John*, and the master of the *St. John* had a right to suppose that the *Mary Bannatyne* saw him, and would obey the rule, and port her helm in sufficient time to avoid the accident, which it would have been time enough to do when he first hailed the *Mary Bannatyne*. If the *St. John* had put her helm a-starboard she might perhaps have avoided the accident, provided the *Mary Bannatyne* had kept her course; but if the *Mary Bannatyne* had put her helm a-port, as she was bound to do, the starboarding of the helm of the *St. John* would only have rendered the collision more certain. If the *St. John* had put her helm further a-port, she would have got into the wind, and the command over her would have been lost; nor is it alleged that her so doing would have avoided the collision: nor indeed was it likely that in the middle of the night, and in a sudden emergency, any very delicate manœuvre could be attempted, or its advantages or disadvantages calculated.

With respect to the alleged admissions of the master of the *St. John* to Mr. Rowbottom and Captain Vraughan, after the arrival of the vessel at Quebec, although as no such admissions were pleaded and it was therefore irregular to receive evidence of them, yet it may be observed that the admissions, if made, were made in a desultory conversation; and the principal one, that the accident was as much the fault of one vessel as the other, is directly contradicted by the evidence on oath of the person who is said to have made it. With respect to the admission that he saw the *Mary Bannatyne* half an hour before, and could have avoided the accident if he had altered his course, that is in no respect at variance with the master's evidence, and its effect has been already commented upon.

Even admitting, which seems probable, that the lookout man of the *Mary Bannatyne* was the only person to

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blame, and that the officers and crew did all that could be done when they knew the danger, this can make no difference, for, however much his negligence may be to be regretted, the ship is clearly responsible for the fault of her look-out.

It is to be remarked in reference to this point, that it is admitted on both sides that a considerable number of vessels were at that time beating up in the neighbourhood of the two vessels in question. They had crossed each other in the day-time of the 16th, on opposite tacks, and within the distance of 100 feet; so close, indeed, that the St. John, being then on the port tack, had to give way to the Mary Bannatyne; and it is admitted in the defensive allegation that the St. John had been seen by the Mary Bannatyne at about half-past 10 P.M. It was, therefore, almost certain that, when the two vessels went about,—which they did, and must necessarily have done, within a few hours afterwards,—they would meet or pass close to each other; and it was therefore especially incumbent on both to keep the best possible look-out, in order to avoid such an accident as actually occurred. Nothing but a very great difference in speed and power of working to windward could prevent their meeting as they did, and no such difference is shown to have existed, or was likely; on the contrary, the vessels appear to have been as nearly as possible equal in speed, and other sailing qualities, as indeed they were likely to be, being of the same class, tonnage, and rig. Under these circumstances, nothing but the utmost possible care could prevent the chance of collision, and the Mary Bannatyne being the ship which, in case of a meeting, would be bound to give way to the other, as being on the port tack, it was more especially incumbent on her to spare no pains to make her look-out efficient. From her construction and position it appears that it was very difficult for any one except a person on the fore-castle to see an approaching vessel, and it would

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perhaps have been more prudent to have had more than one stationed there.

The decree must therefore be in favour of the owners of the *St. John*, and against the *Mary Bannatyne*.

Stuart and Vannorous, for the *St. John*.

Alleyn, for the *Mary Bannatyne*.

Friday, 12th October, 1855.

VARUNA—DAVIES.

*Seamen — Wages — Shipping Articles — Description of Voyage —
Mercantile Marine Act of 1850 — Merchant Shipping Act of 1854.*

VARUNA.

Where seamen shipped for a "voyage from the port of Liverpool to Constantinople, thence (if required) to any port or places in the Mediterranean or Black Seas, or wherever freight may offer, with liberty to call at a port for orders, and until her return to a final port of destination in the United Kingdom, or for a term not to exceed twelve months," and the ship went to Constantinople in prosecution of the contemplated voyage, and then returned to Malta, whence, instead of going to a final port of destination in the United Kingdom, she came direct to Quebec in search of freight, which she had failed to obtain at the ports at which she had previously been,—it was held, that coming to Quebec could not be considered a prosecution of the voyage under the 94th section of the Mercantile Marine Act of 1850, re-enacted by the 190th section of the Merchant Shipping Act of 1854.

The Court this day delivered its opinion in the above cause, to the following effect :—

JUDGMENT.—*Hon. Henry Black.*

Three suits for wages having been instituted by seamen against the ship Varuna, before two Justices of the Peace for the district of Quebec, the cases have been by the Justices referred to be adjudged by this Court. These cases turn purely upon the question whether the men are, under the 94th section of "The Mercantile Marine Act, 1850," or the 190th section of "The Merchant Shipping Act, 1854," entitled to sue for their wages on the ground that the voyage for which they engaged, and their engagement, have been terminated by the ship's having, as they allege, abandoned the voyage mentioned in the articles of agreement, and commenced another voyage for which

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they had not agreed. The articles are dated the 29th of March, 1855, and the part material to the present case is in the following words:—"The several persons whose names are hereto subscribed, hereby agree to serve on board the said ship in the several capacities expressed against their respective names, *on a voyage from the port of Liverpool to Constantinople, thence (if required) to any ports or places in the Mediterranean or Black Seas, or wherever freight may offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom, or for a term not to exceed twelve months.*" The ship went to Constantinople in prosecution of the contemplated voyage, and then returned to Malta, whence, instead of going to a final port of destination in the United Kingdom, she came direct to Quebec, in search of freight, which she had failed to obtain at the ports at which she had previously been.

The 94th section of the Mercantile Marine Act, 1850, is in the following words:—"No seaman who is engaged for a voyage or engagement which is to terminate in the United Kingdom, shall be entitled to sue abroad for wages in any Court or before any justice, unless he be discharged in the manner required by the General Seamen's Act, and with the written consent of the master, or proves such ill-usage on the part of the master, or by his authority, as to warrant reasonable apprehension of danger to the life of such seaman by remaining on board; but if any seaman on his return to the United Kingdom proves that the master or owner has been guilty of any conduct or default which, but for this enactment, would have entitled the seaman to sue for wages before the termination of the voyage or engagement, he shall be entitled to recover, in addition to his wages, such compensation, not exceeding twenty pounds, as the Court of justice hearing the case, may think reasonable." This provision is also repeated in the Merchant Shipping Act,

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1854, which came into operation on the first of May last. The contract being dated before that day, must, I think, be considered with reference to the former, though it would, in law, make no difference, as the words of the two Acts are the same (a).

If the ship's coming to Quebec can, under the Act, be considered as a prosecution of the voyage under which these men shipped, then they are not entitled to sue here, and the case must be dismissed. If, on the contrary, the ship's coming to Quebec, cannot be held to be a prosecution of such voyage, then the voyage for which they engaged, is at an end by the act of the master or owners, and they must recover.

The language used by the legislature with regard to the description of the voyage, which must be inserted in the shipping articles, has been altered several times in the successive Acts; but the words of the Mercantile Marine Act, 1850 (13 & 14 Vict., c. 93), which was in force when the contract was entered into, are, that the articles shall mention, "the nature, and as far as practicable, the length of the voyage or engagement on which the ship is to be employed." The law which came in force on the first of May last (17 & 18 Vict. c. 104), but which does not however legally apply to these cases, is nearly the same. It requires that the agreement shall contain, "the nature, and, as far as practicable, the duration of the intended voyage or engagement." A voyage is a technical phrase, and imports a definite commencement, and end. In the present case, the commencement was Liverpool, and the end a final port of discharge in the United Kingdom. But the Act also requires that the nature of the voyage be stated, and in compliance with this requirement it is described in the articles as to Constantinople, thence, if required, to any ports and

(a) 13 & 14 Vict. c. 93, § 94, and 17 & 18 Vict. c. 104, § 190.

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places in the Mediterranean or Black Seas, or wherever freight might offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom: and as the Act also requires that as far as practicable the length of the voyage or engagement on which the ship is to be employed should be mentioned, the articles state a term not to exceed twelve months. The nature of a voyage undoubtedly consists in the place or places to which it is intended to be made; and the instrument in the present instance must be construed with reference to the description of the voyage given in it, as well as to the term of twelve months to which that voyage is to be limited. This term must be construed as a further limitation to the description of the voyage, and not as an alternative substituted for the previous description of its nature, authorising a voyage to any part of the globe to and from which the ship could go and return in twelve months. To construe it as such alternative would be to nullify the previous description of the nature of the voyage; which the Act requires as well as its probable length, showing clearly the intention of the Legislature that the nature of the voyage was a thing perfectly distinct from its mere length, and that both length and nature were of the essence of the contract, and must be stated. Now, I cannot think that a voyage to Quebec, through the Gulf of St. Lawrence in the north-western parts of the Atlantic Ocean, can be considered to be part of a voyage to a port or ports in the Mediterranean or Black Sea, in the south-eastern parts of another quarter of the globe.

The words "or wherever freight may offer," are to be construed with reference to the previous description of the voyage, and must be considered as meaning any ports or places in the two seas named in the articles, or some place in their immediate neighbourhood, or between them and the United Kingdom. Lord *Stowell's* expressions,

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in commenting upon the application of the words "or elsewhere" in a parallel case, are remarkably apposite. He observes, that he has no hesitation in asserting, that they are not to be taken in that indefinite latitude in which they are expressed; they are no description of a voyage; they are an unlimited description of the navigable globe; and are not to be admitted as a universal alibi for the whole world, including the most remote, and even pestilential shores, indefinite otherwise both in space and time; they must receive a reasonable construction, which must be, to a certain extent, conformable to the necessities of commerce. The word "elsewhere" must, in its construction, vary much, according to the situation of the primary port of destination; if it is applied to a country remote from all neighbouring settlements, it is entitled to a larger construction; if to one that is surrounded by many adjacent ports, the limitation would be much narrowed: and I cannot help observing here, that the captain has deprived himself of an extensive latitude, by describing the primary port to be in the neighbourhood of many adjacent ports, which could supply cargoes (b). It appears to me that no reasoning can be more conclusive than this; and thinking, as I do, that the voyage of the *Varuna* to Quebec, is one which cannot come within the description of the intended voyage for which the men agreed, but is a departure from that voyage, and the substitution of a new and perfectly different one, by which departure and substitution the contract between them and the master is terminated, I am of opinion that the men are entitled to recover their wages at this port; and I accordingly overrule the protest of the master by which their right so to recover has been contested (c).

Charles Alleyn, for seamen.

Richard Pope, for ship.

- (b) The *Minerva*, 1 Hagg. 361. Parliament the words "nature of the voyage" must have such a
- (c) In interpreting the Act of

VARUNA.

rational construction as to answer the main and leading purpose for which they were framed, namely, to give the mariner a fair intimation of the nature of the service in which he was about to engage himself when he signed the ship's articles. Looking at the tenor of the articles in the present case, I am of opinion that the terms which are used give him no intimation whether he is to winter in the frozen regions of the north, or perform an easy service in the luxurious climate of Naples or Trieste. I am yet to learn that such comprehensive ambiguity is necessary for purposes of trade: and if not necessary, I cannot believe that a just construction of this statute will impose any such grievance upon the seaman. I am not disposed to narrow its interpretation in cases where the exigence or convenience of commerce call for an extended latitude of construction: but I am inclined to

say that this statute does not warrant an arbitrary extension of terms not required for the interest of the owner, yet so vague and indefinite as to deprive the mariner of all the benefit intended to be conferred upon him, when the legislature ordained that some information should be conveyed to him of the extent of the obligation into which he was about to enter. For these reasons, I am of opinion that the statute does not confer upon these articles a validity which they certainly would not have possessed if framed before the statute passed. I must, therefore, pronounce sentence in favour of the claim set up by the mariners in this case, and as a matter of course, with costs against the owners.—*Dr. Lushington* in delivering his judgment in the case of the *Westmorland*, 1 W. Rob. 228.

Friday, 26th December, 1856.

THETIS—WATKINSON.

THETIS.

If a suit be brought by a seamen for wages, a settlement without the concurrence of the promoter's proctor does not bar the claim for costs; the Court will inquire whether the arrangement was or was not reasonable and just, and relieve the proctor if it were not so.

JUDGMENT.—*Hon. Henry Black.*

There being due to the promoter in this cause a balance of 60*l.* 14*s.* 10*d.* sterling,—out of wages amounting to 111*l.* 4*s.* sterling, earned on board the ship *Thetis*, on a voyage from London to Callao, a sea-port in Peru, thence to Chinca Islands, thence to Marseilles, thence to Algiers, thence to Kamiesch, thence to Constantinople, and thence to Quebec,—he on the 30th August last obtained process out of this Court, under which the ship was arrested on the same day. The following day (31st), bail was put in by the owners; and an appearance was filed in their name on the first of September. On the last-mentioned day the master of the vessel, William Henry Watkinson, took the promoter to the shipping office at this port, and there paid him the amount of the wages, and obtained from him a receipt in the following terms:—

Quebec, September first, one thousand eight hundred and fifty-six.

£60 14*s.* 10*d.* sterling.

I do hereby certify that I, Henry Hall, have received

THETIS.

from Capt. William Henry Watkinson, the sum of seventy-three pounds eighteen shillings and one penny currency, being the balance of wages due to me for my services on board the Thetis, of Goole, and in full of all my demands up to this date against the said vessel, her master or owners ; and I hereby certify that I have no claim in any way whatever against the said vessel, her owners or master, or whoever it may concern : and I also declare, in the presence of the witnesses who here fix their signatures to this document or receipt, that I fully understand the meaning of this "receipt."

HENRY HALL.

£73 18s. 1d. currency.

Witnesses,

A. G. Hawkins.

Patk. M^cNamara.

The money was paid, and the receipt signed by the promoter in the absence of his proctor, and without his knowledge or any notice to him, and the costs of the suit not being paid, the suit has been continued for the costs ; and the only question argued before the Court is, whether under the circumstances, the owners of the ship were or were not liable for the costs ; and whether they can or cannot claim to be released from their bail bond, or recognisance, without paying the costs of the promoter. The master has not been examined to prove the circumstances under which the receipt was given ; and the subscribing witnesses prove nothing more than the signature to the receipt, which, it appears by the evidence, the master produced in the shipping office, and, it would seem, he had about him, ready prepared, and written out. The owners, in their plea, allege that the promoter, at the time of signing the receipt, undertook to pay his own costs ; but no evidence of this fact has been given.

THEIR.

He was clearly entitled to his costs, as well as the wages, and obliging him to pay his own costs was, in fact, deducting so much from his wages. Nor is there anything in the receipt upon the subject of costs which can be fairly considered as an undertaking to pay the costs. The word "costs" does not even occur; nor, if the word had been used, or even if the agreement to pay the costs had been proved, does it appear that it would affect the more general question, whether the right of the proctor to avail himself of the recognisance, as security for his costs, could have been lost by the mere act of the client, to which the proctor was not a party, and of which he was not informed.

Seamen are a needy and transient class, and the remedy of the proctor against the promoter only, without recourse against the vessel or its owners, would be wholly illusory. To deprive him of his recourse, under the recognisance, would in reality be to deprive him of his fees, as well as of any disbursements he might incur; and it would be inconsistent with every principle of equity that he should lose this recourse, except by his own consent, or by some laches on his part; and neither such consent, nor such laches appear. In courts of civil law the parties themselves have strictly no authority over the cause after their regular appearance by an attorney or proctor. The attorney or proctor is so far regarded as the *dominus litis* that no proceeding can be taken, except by him or by his written consent, until a final decree or revocation of his authority. In actions by seamen especially, who are an uneducated and needy class, the promoters are regarded as essentially under tutelage, every dealing with them personally by the adverse party in respect of their suits, is scrutinised by the Court with great distrust. Lord *Stowell* declares that negotiations with seamen, even *before* suit brought, are conducted more to the satisfac-

THETIS.

tion of the Court, when entrusted to their proctors (a). Masters and owners are generally shrewd, business men, well informed as to their rights and those of the party with whom they deal, and have ample means of obtaining advice, if they require it; while seamen are generally uninformed as to their rights, and being unable, from want of means, to remain inactive at the port where their suit may be pending, are naturally eager to effect a settlement, which will enable them to pursue their ordinary occupation, and very unlikely to consider the interest of their proctors, whom they perhaps never expect again to see, after such settlement. Personal recourse against them is absolutely nugatory, even if it were possible to find them, which it very seldom is; and if a settlement with them were allowed to affect the costs incurred on their behalf, it would happen in almost every case, where the suit was likely to go in their favour, that the opposite party would compromise with them, and cheat their proctors, and the officers of the Court.

Under these circumstances, even if the receipt had expressly mentioned costs, the Court would have felt bound to take into consideration the question whether the arrangement was or was not reasonable and just, and to relieve the proctor if it were not. But, it will be observed, that the receipt is so framed as to avoid bringing before the mind of the seaman the distinct question of costs, or his personal obligation to pay his proctor, which he would probably have refused to assume if distinctly proposed to him. The receipt was evidently framed by some person who endeavoured to embrace the question in general terms, and to avoid bringing it prominently or distinctly forward, so as to arrest the attention of the party who had to sign it. Considering therefore that the receipt did not release the claim for costs, or if it did, that it was fraudu-

(a) *The Frederick*, Hearn. 1 Hag. 220.

lently obtained from the promoter, without the knowledge or consent of his proctor, and without payment or tender of the taxable costs due in the suit, I condemn the owners, and the bail given on their behalf, to answer the action, in costs.

TERTIS.

O'Farrell, for seaman.

Hearn, for owners.

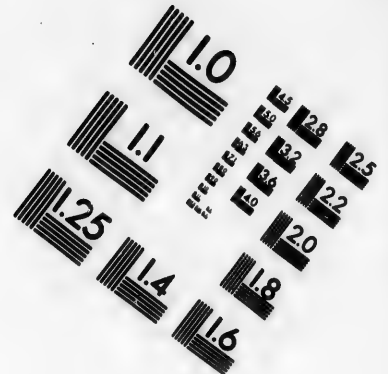
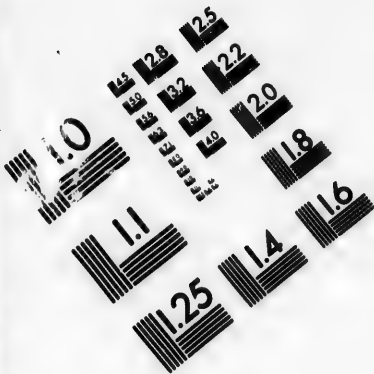
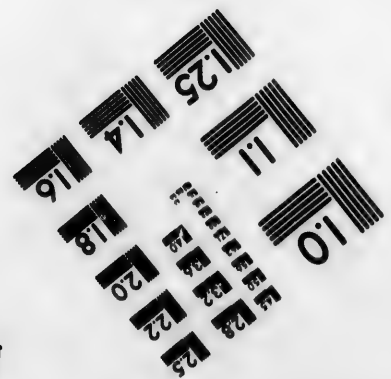
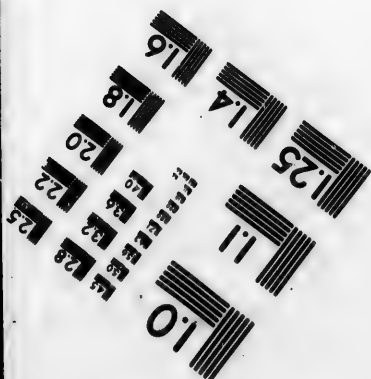
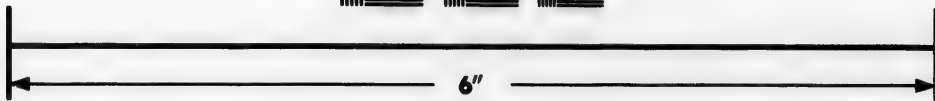
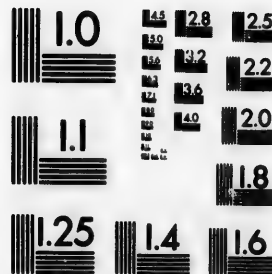


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APPENDIX

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- B.—Commission under the great seal of the High Court of Admiralty of England, appointing Henry Black, Judge of the Vice-Admiralty Court for Lower Canada, dated 27th October, 1838.
- C.—Commission under the great seal of Great Britain, for the trial of offences committed within the jurisdiction of the Admiralty of England, dated 30th October, 1841.
- D.—The following cases decided by Mr. Kerr :—
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 - Case of the *Coldstream*.
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(A)

COMMISSION OF VICE-ADMIRAL.

George the Third, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, To our beloved James Murray, Esquire, our Captain-General and Governor-in-Chief in and over our Province of Quebec, in America,—greeting.

Commission to be vice-admiral, commissary, and deputy in the office of vice-admiralty in the province of Quebec.

We, confiding very much in your fidelity, care, and circumspection in this behalf, do, by these presents, which are to continue during our pleasure only, constitute and depute you, the said James Murray, Esquire, our Captain-General and Governor-in-Chief aforesaid, our Vice-Admiral, Commissary, and Deputy in the Office of Vice-Admiralty in our Province of Quebec aforesaid, and territories thereon depending, and in the maritime parts of the same and thereto adjoining whatsoever; with power of taking and receiving all and every the fees, profits, advantages, emoluments, commodities, and appurtenances whatsoever due and belonging to the said office of vice-admiral, commissary and deputy in our said province of Quebec, and territories depending thereon, and maritime parts of the same and adjoining to them whatsoever, according to the ordinances and statutes of our High Court of Admiralty in England.

To what places vice-admiral's jurisdiction shall extend.

And we do hereby remit and grant unto you, the aforesaid James Murray, Esquire, our power and authority in and throughout our province of Quebec afore-mentioned, and territories thereof, and maritime parts whatsoever of the same and thereto adjacent, and also throughout all and every the sea-shores, public streams, ports, fresh-water rivers, creeks, and arms as well of the sea as of the rivers and coasts whatsoever of our said province of Quebec, and territories dependent thereon, and maritime parts whatsoever of the same and thereto adjacent, as well within liberties and franchises as without; to take cognizance of, and proceed in, all causes civil and maritime, and in complaints, contracts, offences, or suspected offences, crimes, pleas, debts, exchanges, accounts, charter-parties, agreements, suits, trespasses, injuries, extortions, and demands, and business, civil and maritime whatsoever, commenced or to be commenced between merchants, or between owners and proprietors of ships and other vessels, and merchants or others whomsoever with such owners and proprietors of ships and all other vessels whatsoever employed or used within the maritime jurisdiction of our vice-admiralty of our said province of Quebec, and territories depending on the same, or between any

In what causes.

Between what persons.

other persons whomsoever, had, made, begun, or contracted, for any matter, thing, cause, or business whatsoever, done or to be done within our maritime jurisdiction aforesaid, together with all and singular their incidents, emergencies, dependencies, annexed or connected causes whatsoever, or howsoever; and such causes, complaints, contracts, and other the premises above said, or any of them, which may happen to arise, be contracted, had, or done, to hear and determine according to the rights, statutes, laws, ordinances, and customs anciently observed.

And moreover, in all and singular complaints, contracts, agreements, causes, and business, civil and maritime, to be performed beyond the sea, or contracted there, howsoever arising or happening; and also in all and singular other causes and matters, which in any manner whatsoever touch or any way concern, or anciently have and do, or ought to, belong unto the maritime jurisdiction of our aforesaid vice-admiralty in our said province of Quebec, and territories thereon depending, and maritime parts thereof and to the same adjoining whatsoever; and generally in all and singular all other causes, suits, crimes, offences, excesses, injuries, complaints, misdemeanors, or suspected misdemeanors, trespasses, regrating, forestalling, and maritime businesses whatsoever, throughout the places aforesaid within the maritime jurisdiction of our vice-admiralty of our province of Quebec aforesaid, and territories thereon depending, by sea or water, or the banks or shores of the same, howsoever done, committed, perpetrated, or happening.

And also to inquire by the oaths of honest and lawful men of our said province of Quebec, and territories dependent thereon, and maritime parts of the same and adjoining to them whatsoever, dwelling both within liberties and franchises and without, as well of all and singular such matters and things which of right, and by the statutes, laws, ordinances, and customs anciently observed were wont and ought to be inquired after, as of wreck of the sea, and of all and singular the goods and chattels of whatsoever traitors, pirates, man-slayers, and felons howsoever offending within the maritime jurisdiction of our vice-admiralty of our province of Quebec aforesaid, and territories thereunto belonging, and of the goods, chattels, and debts of all and singular their maintainers, accessaries, counsellors, abettors, or assistants whomsoever.

And also of the goods, debts, and chattels of whatsoever person or persons felons of themselves, by what means or howsoever coming to their death within our aforesaid maritime jurisdiction, wheresoever any such goods, debts, and chattels, or any part thereof, by sea, water, or land in our said province of Quebec, and territories thereon dependent, and maritime parts of the same and thereto adjacent whatsoever, as well within liberties and franchises as without, have been or shall be found forfeited, or to be forfeited, or in being.

To inquire by a jury of such matters as of right, and by ancient laws and usages, ought to be inquired of. And of wreck of the sea, and the goods of traitors and felons;

And of the goods of felons of themselves.

Also of goods
waived, flotson,
jetson, lagon,
deodands, dere-
licts, and other
casualties, upon
the sea, or
sea-coasts,
or fresh-water
rivers as far as
the tide flows.

Also of anchor-
age, lastage,
ballast, and
fishes royal.

Power to re-
ceive and pre-
serve to the
King's use all
the profits
above-men-
tioned; and
all fines im-
posed by any
court of admi-
ralty held in
this province,
and recogniz-
ances forfeited
therein.

And moreover, as well of the goods, debts, and chattels of whatso-
ever other traitors, felons, and manslaughterers wheresoever offending,
and of the goods, debts, and chattels of their maintainers, accessaries,
counsellors, abettors, or assistants, as of the goods, debts, or chattels
of all fugitives, persons convicted, attainted, condemned, outlawed,
or howsoever put, or to be put, in exigent for treason, felony, man-
slaughter, or murder, or any other offence or crime whatsoever; and
also concerning goods waived, flotson, jetson, lagon, shares and trea-
sure found or to be found; deodands, and of the goods of all others
whatsoever taken or to be taken as derelict, or by chance found, or
howsoever due or to be due; and of all other casualties, as well in,
upon, or by the sea and shores, creeks or coasts of the sea or maritime
parts, as in, upon, or by all fresh waters, ports, public streams,
rivers, or creeks, or places overflown whatsoever within the
ebbing and flowing of the sea or high water, or upon the shores
and banks of any of the same within our maritime jurisdiction
aforesaid, howsoever, whensoever, or by what means soever arising,
happening, or proceeding, or wheresoever such goods, debts, and
chattels, or other the premises, or any parcel thereof, may or shall
happen to be met with or found within our maritime jurisdiction
aforesaid.

And also, concerning anchorage, lastage, and ballast of ships, and
of fishes royal, namely, sturgeons, whales, porpoises, dolphins, kiggs,
and grampusses, and generally of all other fishes whatsoever which
are of a great or very large bulk or fatness, anciently by right, or
custom, or any way appertaining or belonging to us.

And to ask, require, levy, take, collect, receive, and obtain for the
use of us, and to the office of our high admiral of Great Britain afore-
said for the time being, to keep and preserve the said wreck of the
sea, and the goods, debts, and chattels of all and singular other the
premises, together with all and all manner of fines, mulcts, issues,
forfeitures, amerciaments, ransoms, and recognizances whatsoever,
forfeited, or to be forfeited, and pecuniary punishments for trespasses,
crimes, injuries, extortions, contempts, and other misdemeanors
whatsoever, howsoever imposed or inflicted, or to be imposed or
inflicted, for any matter, cause, or thing whatsoever in our said
province of Quebec, and territories thereunto belonging, and mari-
time parts of the same and thereto adjoining, in any court of our
admiralty there held, or to be held, presented or to be presented,
assessed, brought, forfeited, or adjudged; and also all amerciaments,
issues, fines, perquisites, mulcts, and pecuniary punishments whatso-
ever, and forfeitures of all manner of recognizances, before you or
your lieutenant, deputy, or deputies, in our said province of Quebec,
and territories thereunto belonging, and maritime parts of the same
and thereto adjacent whatsoever, happening, or imposed, or to be
imposed or inflicted, or by any means assessed, presented, forfeited,

or adjudged, or howsoever, by reason of the premises, due or to be due in that behalf to us, or to our heirs and successors.

And further, to take all manner of recognizances, cautions, obligations, and stipulations, as well to our use as at the instances of any party, for agreements, or debts, or other causes whatsoever, and to put the same into execution, and to cause and command them to be executed; and also to arrest, and cause and command to be arrested, according to the civil and maritime laws and ancient customs of our said court, all ships, persons, things, goods, wares, and merchandises, for the premises, and every of them, and for other causes whatsoever concerning the same, wheresoever they shall be met with or found throughout our said province of Quebec, and territories thereunto belonging, and maritime parts thereof and thereto adjoining, as well within liberties and franchises as without; and likewise for all other agreements, causes, or debts, howsoever contracted or arising, so that the goods, or persons may be found within our jurisdiction aforesaid.

And to hear, examine, discuss, and finally determine the same, with their emergencies, dependencies, incidents, annexed and connected causes and businesses whatsoever, together with all other causes, civil and maritime, and complaints, contracts, and all and every the respective premises whatsoever above-expressed, according to the laws and customs aforesaid, and by all other lawful ways, means and methods, according to the best of your skill and knowledge.

And to compel all manner of persons in that behalf, as the case shall require, to appear and to answer, with power of using any temporal correction, and of inflicting any other penalty, or mulct, according to the laws and customs aforesaid.

And to do and administer justice according to the right order and course of the law, summarily and plainly, looking only into the truth of the facts.

And to fine, correct, punish, chastise, reform, and to imprison, and cause and command to be imprisoned, in any gaols, being within our province of Quebec aforesaid, and territories thereunto belonging, the parties guilty, and the contemnors of the law and jurisdiction of our admiralty aforesaid, and violaters, usurpers, delinquents, and contumacious absenters, masters of ships, mariners, rowers, fishermen, shipwrights, and other workmen and artificers whatsoever, exercising any kind of maritime affairs, according to the rights, statutes, laws, and ordinances, and customs anciently observed; and to deliver and absolutely discharge, and cause and command to be discharged, whatsoever persons imprisoned in such cases, who are to be delivered.

And to preserve, or cause to be preserved, the public streams, ports, rivers, fresh waters, and creeks whatsoever, within our maritime jurisdiction aforesaid, in what place soever they be in our province of Quebec aforesaid, and territories thereunto belonging, and maritime parts of the same and thereto adjacent whatsoever, as well for the

And to take recognizances and bonds, either for the King's use, or that of private subjects; and to award execution upon them; and to arrest ships, goods, and persons for causes arising within the maritime jurisdiction.

And to hear and determine the said causes, with all the matters incident thereto.

And to compel persons to appear and answer.

And to fine and to imprison, in any of the gaols of the province, the parties that shall be found guilty:

And to deliver and discharge from prison persons imprisoned for the same when they ought to be so discharged:

And to preserve public streams, ports and rivers.

preservation of our navy royal, and of the fleets and vessels of our kingdom and dominions aforesaid, as of whatsoever fishes increasing in the rivers and places aforesaid.

And also to keep, and cause to be executed and kept, in our said province of Quebec, and territories thereunto belonging, and maritime parts thereof and thereto adjacent whatsoever, the rights, statutes, laws, ordinances, and customs anciently observed.

And to do, exercise, expedite, and execute all and singular other things in the premises, and every of them, as they by right, and according to the laws and statutes, ordinances and customs aforesaid, should be done.

And to reform nets that are too close, and other unlawful engines for catching fish. And to punish those who make use of them.

And moreover, to reform nets too close, and other unlawful engines or instruments whatsoever for the catching of fishes wheresoever, by sea, or public streams, ports, rivers, fresh waters, or creeks whatsoever, throughout our province of Quebec aforesaid, and territories depending thereon, and maritime parts of the same and thereto adjacent, used or exercised within our maritime jurisdictions aforesaid wheresoever. And to punish and correct the exersoisers and occupiers thereof, according to the statutes, laws, ordinances, and customs aforesaid.

And to pronounce sentences in all causes relating to the sea, and put the same in execution. And to proceed in the said causes as well of mere office as at the instance of parties.

And to pronounce, promulge, and interpose all manner of sentences and decrees, and to put the same in execution ; with cognizance and jurisdiction of whatsoever other causes, civil and maritime, which relate to the sea, or which any manner of ways respect or concern the sea, or passage over the same, or naval or maritime voyages, or our said maritime jurisdiction, or the places or limits of our said admiralty, and cognizance afore-mentioned, and all other things done or to be done.

And to have cognizance of wreck of the sea, and view of dead bodies of persons coming to their deaths upon the sea or within the maritime jurisdiction.

With power also to proceed in the same, according to the statutes, laws, ordinances, and customs aforesaid anciently used, as well of mere office mixt or promoted, as at the instance of any party, as the case shall require and seem convenient ; and likewise with cognizance and decision of wreck of the sea, and of the death, drowning, and view of dead bodies of all persons howsoever killed, or drowned, or murdered, or which shall happen to be killed, drowned, or murdered, or by any other means come to their death in the sea or public streams, ports, fresh waters, or creeks whatsoever, within the flowing of the sea and high-water mark throughout our aforesaid province of Quebec, and territories thereunto belonging, and maritime part of the same and thereto adjacent, or elsewhere within our maritime jurisdiction aforesaid.

And to have cognizance of mayhem within the maritime jurisdiction.

Together with the cognizance of mayhem in the aforesaid places, within our maritime jurisdiction aforesaid, and flowing of the sea and water there happening ; with power also of punishing all delinquents in that kind according to the exigencies of the law and customs aforesaid.

And to do, exercise, expedite, and execute all and singular other things which in and about the premises only shall be necessary or thought meet, according to the rights, statutes, laws, ordinances, and customs aforesaid.

With power of deputing and surrogating in your place for the premises one or more deputy or deputies, as often as you shall think fit; and also with power from time to time of naming, appointing, ordaining, assigning, making, and constituting whatsoever other necessary, fit, and convenient officers and ministers under you for the said office and execution thereof in our said province of Quebec, and territories thereunto belonging, and maritime parts of the same and thereto adjacent whatsoever.

Saving always the right of our High Court of Admiralty of England, and also of the judge and registrar of the said court, from whom or either of them it is not our intention in anything to derogate by these presents; and saving to every one who shall be wronged or grieved by any definitive sentence or interlocutory decree which shall be given in the Vice-Admiralty Court of our province of Quebec aforesaid, and territories thereunto belonging, the right of appealing to our aforesaid High Court of Admiralty of England.

Provided, nevertheless, and under this express condition, that if you, the aforesaid James Murray, Esquire, our Captain-General and Governor-in-Chief, shall not yearly (to wit), at the end of every year, between the feasts of St. Michael the archangel and All Saints, duly certify, and cause to be effectually certified (if you shall be thereunto required), to us, and our lieutenant official, principal, and commissary general and special, and judge and president of the High Court of our Admiralty of England aforesaid, all that which from time to time by virtue of these presents you shall do and execute, collect, or receive in the premises, or any of them, together with your full and faithful account thereupon, to be made in an authentic form, and sealed with the seal of our office remaining in your custody, that from thence and after default therein these our letters patent of the office of vice-admiralty aforesaid, as above granted, shall be null and void, and of no force or effect.

Further we do, in our name, command all and singular our governors, justices, mayors, sheriffs, captains, marshals, bailiffs, keepers of all our gaols and prisons, constables, and all other our officers and faithful liege subjects whatsoever, and every of them, as well within liberties and franchises as without, that in and about the execution of the premises, and every of them, they be aiding, favouring, assisting, submissive, and yield obedience in all things as is fitting to you, the aforesaid James Murray, Esquire, our Captain-General and Governor-in-Chief of our province of Quebec aforesaid, and to your deputy whomsoever, and to all other officers by you appointed, and to be appointed, of our said vice-admiralty in our province of Quebec afore-

Power to make one or more deputies and to appoint inferior officers.

Saving the right of the High Court of Admiralty; and saving the right of appealing thereto from any sentence of the Court of Vice-Admiralty at Quebec.

Proviso that the vice-admiral shall yearly certify under the seal of his office the proceedings had in his court to the judge of the High Court of Admiralty. And upon default made herein these letters patent shall be void.

All officers, civil and military, and all other subjects whatsoever, are enjoined to be assisting to the vice-admiral and his deputies in the execution of this office.

said, and territories thereunto belonging, and maritime parts of the same and thereto adjoining, under pain of the law, and the peril which will fall thereon.

Given at London in the High Court of our Admiralty of England aforesaid, under the Great Seal thereof, the nineteenth day of March in the year of our Lord, one thousand seven hundred and sixty-four and of our reign the fourth.

(Signed)

GODF. LEE TARRANT,

Registrar.

(B)

LETTERS PATENT APPOINTING JUDGE.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To Our well beloved Henry Black, Esq.,—Greeting.

We do by these presents, make, ordain, nominate, and appoint you, the said Henry Black, to be our commissary in our Vice-Admiralty Court, in our province of Lower Canada, in America, and territories thereunto belonging. And we do hereby grant unto you full power to take cognizance of, and proceed in, all causes civil and maritime, and in complaints, contracts, offences, or suspected offences, crimes, pleas, debts, exchanges, policies of assurances, accounts, charter parties, agreements, bills of lading of ships, and all matters and contracts, which in any manner whatsoever relate to freight due for ships hired and let out, and transport money or maritime usury, otherwise bottomry, or which do any ways concern suits, trespasses, injuries, extortions, demands, and affairs civil and maritime whatsoever, between merchants, or between owners and proprietors of ships or other vessels, and merchandises, or other persons whomsoever, with such owners and proprietors of ships and all other vessels whatsoever, employed or used, or between any other persons howsoever, had, began, made or contracted, for any matter, cause or thing, business or injury whatsoever, done or to be done as well in, upon or by the sea or public streams, fresh waters, ports, rivers, creeks and places overflowed whatsoever, within the ebbing and flowing of the sea, or high water mark, as upon any of the shores or banks adjoining to them or either of them, together with all and singular their incidents, emergents, dependencies, annexed and connexed causes whatsoever:—and such causes, complaints, contracts, and other the premises aforesaid, or any of them, howsoever the same

may happen to arise, be contracted, had or done, to hear and determine according to the civil and maritime laws and customs of our High Court of Admiralty of England, in our said province of Lower Canada, and maritime parts of the same, and thereto adjacent whatsoever. And also with power to sit and hold courts in any cities, towns and places in our province of Lower Canada aforesaid, for the hearing and determining of all such causes and businesses, together with all and singular their incidents, emergencies, and dependencies, annexed and connexed causes whatsoever, and to proceed judiciously and according to law in administering justice therein; and moreover, to compel witnesses, in case they withdraw themselves for interest, fear, favour, or ill-will, or any other cause whatsoever, to give evidence to the truth in all and every causes above-mentioned, according to the exigencies of the law. And further, to take all manner of recognizances, cautions, obligations, and stipulations, as well to our use as at the instance of any parties, for agreements or debts, or other causes and businesses whatsoever, and to put the same in execution, and to cause and command them to be executed. And duly to search and enquire of and concerning all goods of traitors, pirates, manslaughterers, felons, fugitives, and felons of themselves, and concerning the bodies of persons drowned, killed, or by any other means coming to their death in the sea, or in any ports, rivers, public streams, or creeks, and places overflowed, and also concerning mayhem happening in the aforesaid places, and engines, toils, and nets prohibited and unlawful, and the occupiers thereof. And moreover, concerning fishes royal, namely: whales, kiggs, grampuses, dolphins, sturgeons, and all other fishes whatsoever which are of a great and very large bulk or fatness, by right or custom any ways used, belonging to us and to the office of our high admiral of England; and also of and concerning all casualties at sea, goods wrecked, flotsom, jetsom, lagon, shares, things cast overboard, and wreck of the sea, and all goods taken and to be taken as derelict, or by chance found or to be found, and all other trespasses, misdemeanors, offences, enormities and maritime crimes whatsoever done and committed, or to be done and committed, as well in and upon the high sea, as in all ports, rivers, fresh waters and creeks and shores of the sea to high-water mark, from all first bridges towards the sea, in and throughout our said province of Lower Canada, and maritime coasts thereof, and thereunto belonging, howsoever whensoever, or by what means soever arising or happening. And all such things as are discovered and found out, as also all fees, mulots, amerciaments, and compositions due and to be due in that behalf, to tax, moderate, demand, collect, and levy, and to cause the same to be demanded, levied and collected, and according to law to compel and command them to be paid. And also to proceed in all and every the causes and businesses above recited, and in all other con-

tracts, causes, contempt, and offences whatsoever, howsoever contracted or arising, so that the goods or persons of the debtors may be found within the jurisdiction of the Vice-Admiralty Court in our province of Lower Canada aforesaid, according to the civil and maritime laws and customs of our said High Court of Admiralty of England anciently used, and by all other lawful ways, means, and methods, according to the best of your skill and knowledge; and all such causes and contracts to hear, examine, discuss, and finally determine, (saving nevertheless the right of appealing to us in Council, and saving always the right of our said High Court of Admiralty of England, and of the judge and registrar of our said court, from whom or either of them it is not our intention in any thing to derogate by these presents), and also to arrest, and cause and command to be arrested all ships, persons, things, goods, wares, and merchandises for the premises, and every of them, and for other causes whatsoever concerning the same, wheresoever they shall be met with or found within our province of Lower Canada, aforesaid, and maritime parts thereof, either within liberties or without, and to compel all manner of persons in that behalf, as the case shall require, to appear and to answer; with power of using any temporal coercion, and of inflicting any other penalty or mulct, according to the laws and customs aforesaid, and to do and minister justice according to the right order and course of the law, summarily and plainly, looking only into the truth of the fact. And we empower you in this behalf to fine, correct, punish, chastise and reform and imprison, and cause and command to be imprisoned in any gaol, being within our province of Lower Canada, aforesaid, and maritime parts of the same, the parties guilty and violators of the law and jurisdiction of our Admiralty aforesaid, and usurpers, delinquents, and contumacious absenters, masters of ships, mariners, rowers, fishermen, shipwrights, and other workmen and artificers whomsoever, exercising any kind of maritime affairs, as well according to the afore-mentioned civil and maritime laws and ordinances and customs aforesaid, and their demerits, as according to the statutes and ordinances aforesaid, and those of our United Kingdom of Great Britain and Ireland, for the Admiralty of England in that behalf made and provided. And to deliver and absolutely discharge, and command to be discharged whatsoever other persons imprisoned in such cases, who are to be delivered, and to promulge and interpose all manner of sentences and decrees, and to put the same in execution; with cognizance and jurisdiction of whatsoever other causes, civil and maritime, which relate to the sea, or which in any manner of ways respect or concern the sea or passage over the same, or naval or maritime voyages performed or to be performed, or the maritime jurisdiction aforesaid; with power also to proceed in the same, according to the civil and maritime laws and customs of our aforesaid court anciently

used, as well those of mere office, mixed or promoted, as at the instance of any party, as the case shall require and seem convenient. And we do by these presents, which are to continue during our royal will and pleasure, only further give and grant unto you Henry Black, our said Commissary, the power of taking and receiving all and every the wages, fees, profits, advantages, and commodities whatsoever, in any manner due and anciently belonging to the said office, according to the customs of our High Court of Admiralty of England; committing unto you our power, authority, concerning all and singular the premises in the several places above expressed, (saving in all things the prerogative of our High Court of Admiralty of England, aforesaid;) together with power of deputing and surrogating in your place, for and concerning the premises, one or more deputy or deputies: provided always, that the power of deputing and surrogating one or more deputy or deputies in your place and stead, shall only be exercised on good and sufficient cause shown, and that cause to be approved by our captain general and governor in chief in and over our said province of Lower Canada, or lieutenant governor, or the officer administering the government of our said province for the time being. And further, we do in our name command, and firmly and strictly charge all and singular our governors, commanders, justices of the peace, mayors, sheriffs, marshals, keepers of all our gaols and prisons, bailiffs, constables, and all other our officers and ministers and faithful and liege subjects, in and throughout our aforesaid province of Lower Canada, and the maritime parts of the same and thereto adjacent, that in the execution of this our commission they be, from time to time, aiding, assisting, and yield obedience in all things, as is fitting unto you and your deputy whomsoever, under pain of the Law and the peril which will fall thereon.

Given at London, in the High Court of the Admiralty of England aforesaid, under the Great Seal thereof, the twenty-seventh day of October, in the year of Our Lord, one thousand eight hundred and thirty-eight, and of our reign the second.

ARDEN, Registrar.

(C)

COMMISSION FOR THE TRIAL OF OFFENCES COMMITTED
WITHIN THE ADMIRALTY JURISDICTION.

*Victoria, by the Grace of God, of the United Kingdom of Great
Britain and Ireland, Queen, Defender of the Faith.*

To our governor general of our provinces in North America, and to our governor general of our said provinces for the time being, to our governor of our province of Canada, and to the governor of our said province for the time being, to our lieutenant governor of our said province, and to our lieutenant governor or the officer administering the government of our said province for the time being, to the president and several members of the executive council of our said province, and to the president and several members of the said council for the time being, to our chief justice of that part of the province of Canada, called Lower Canada, and to the chief justice of Lower Canada for the time being, to the judges of our court of Queen's Bench for the district of Quebec, in our said province, and to the judges of our court of Queen's Bench, for the district of Quebec, in our said province, for the time being, to the judge of the court of Vice Admiralty for our said province, and to the judge of the said court for the time being, to the public secretary of the said province, and to the public secretary of the said province for the time being, to the public treasurer of the said province, and to the public treasurer of the said province for the time being, to our commander in chief, and to the several flag officers of such squadron of our ships of war as shall happen to be in any of the ports or roadsteads of our said province, for the time being, and to our several captains and commanders of such our ships of war as shall happen to be in any of the ports or roadsteads of our said province for the time being, and to each and every of them, *greeting* : Whereas, by an Act made in the twenty-eighth year of the reign of King Henry the Eighth, intituled, "An Act for punishment of pirates and robbers of the sea;" which Act is extended and explained by three other Acts, the first made in the thirty-ninth year of the reign of King George the Third, intituled, "An Act for remedying certain defects in the law respecting offences committed upon the high seas;" the second made in the forty-third year of the reign of King George the Third, intituled, "An Act for the more effectually providing for the punishment of offences in

28 H. 8, c. 15.

39 Geo. 3, c.
37.

43 Geo. 3, c.
113.

wilfully casting away, burning or destroying ships and vessels, and for the more convenient trial of accessaries in felonies; and for extending the powers of an Act made in the thirty-third year of the reign of King Henry the Eighth, as far as relates to murders, to accessaries to murders, and to manslaughters;" and the third made in the first year of the reign of King George the Fourth, intituled, "An Act to remove doubts, and to remedy defects in the law, with respect to certain offences committed upon the sea, or within the jurisdiction of the admiralty;"—certain powers and authorities touching all treasons, felonies and other crimes and misdemeanors committed in or upon the sea, or in any haven, river, creek, or place, where the admiral has power, authority, or jurisdiction, are given to certain commissioners constituted as therein provided, after the course of the common law of this our realm to inquire, try and determine the same within this our realm: and whereas, by another Act made in the forty-sixth year of the reign of King George the Third, intituled, "An Act for the more speedy trial of offences committed in distant parts upon the sea," the like powers and authorities, touching all offences so committed as aforesaid, are given also to certain other commissioners constituted as by the said last mentioned Act is provided, after the course of the common law to inquire, try and determine the same in any of our islands, plantations, colonies, dominions, forts and factories: and whereas, by another Act made in the fifth year of the reign of King George the Fourth, intituled, "An Act to amend and consolidate the laws relating to the abolition of the slave trade," the commissioners constituted according to the said Act of the forty-sixth year of the reign of King George the Third are invested with the like powers and authorities to inquire of, try and determine all offences against the said Act of the fifth year of the reign of King George the Fourth, which shall be committed in any place where the admiral has not jurisdiction, and not being within this our United Kingdom, nor within the local jurisdiction of any ordinary court of a British colony, settlement, plantation, or territory competent to try such offences: and whereas, by another Act made in the seventh year of the reign of his Majesty King George the Fourth, intituled, "An Act to enable commissioners for trying offences upon the sea and justices of the peace to take examinations touching such offences, and to commit to safe custody persons charged therewith," certain powers and directions are given to any one or more of the commissioners constituted according to the said Act of the forty-sixth year of the reign of King George the Third, to take informations on oath, and to apprehend and commit or bail the parties charged. Know ye, therefore, that we, confiding very much in your fidelity and careful circumspection. have appointed you, or any one of you, our commissioners or commissioner to take such informations, and to apprehend and commit or bail such persons, under such circumstances and in

1 Geo. 4, c.
90.46 Geo. 3, c.
54.5 Geo. 4, c.
113.

7 Geo. 4, c. 38.

such manner as by the said Act of the seventh year of the reign of his Majesty King George the Fourth is provided in that behalf; and have also appointed you, or any three of you (of which number our will and pleasure is that our said governor general, governor, lieutenant governor or other officer administering the said government, our said chief justice, our said other judges or one of them, or our judge of our said Court of Vice-Admiralty respectively, for the time being, shall always be one), our commissioners to inquire upon the oath of good and lawful men of our said province, and by other ways, means and methods, according to your best knowledge and ability, as well within liberties as without, whereby the truth of the matter may be the better known and inquired into, concerning all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences whatsoever, and accessaries thereto, whomsoever and howsoever done or committed, or hereafter to be done or committed upon the sea, or in any haven, river, creek or other place where the admiral has power, authority, or jurisdiction; and also concerning all offences against the said recited Act of the fifth year of the reign of King George the Fourth which shall be committed in any place where the admiral has not jurisdiction, and not being within this our United Kingdom, nor within the local jurisdiction of any ordinary court of a British colony, settlement, plantation or territory competent to try such offences: and to hear and determine all the offences aforesaid according to the laws and customs of this our realm, and the statutes hereinbefore mentioned, and all other statutes in that behalf made and provided; and therefore we command you, that you and each of you diligently discharge the respective duties of taking informations, and of apprehension, commitment, and bailment as aforesaid: and that at certain times and places which shall be prefixed for this purpose by you or any three of you, at the least (of which number our said governor general, governor, lieutenant governor, or other officer administering the government, our said chief justice, our said other judges, or one of them, or our said judge of our said Court of Vice-Admiralty, respectively, for the time being, shall always be one), you diligently inquire of, try and determine all the said premises, and do in manner aforesaid all things to be done thereupon as appertains to justice, according to the said laws, customs and statutes of this our realm: and we do by these presents command, that it be in our name strictly enjoined to the provost marshal, or other proper officer of our said province, and others whom it may concern and to every of them, as well within liberties as without, that at certain times and places, when and as often as need shall require, which our said governor general, governor, lieutenant governor, or other officer administering the said government, for the time being, shall make known to them or either of them in form aforesaid, they cause to come before you or any three of you, at the least (of which number our said governor general,

governor, lieutenant governor, or other officer administering the said government, our said chief justice and said other judges or one of them, or our said judge of our said Court of Vice-Admiralty respectively, for the time being, shall always be one), so many good and lawful men of our said province, as well within liberties as without, by whom the truth of the matter concerning the premises may be the better known or inquired into: commanding moreover all governors, justices, mayors, sheriffs, bailiffs, stewards, constables, also keepers of gaols and prisons, and all other officers and ministers, and all other our faithful and liege subjects whomsoever, that from time to time, in the execution of the premises and every of them, they be assisting and yielding obedience to you and every of you.

In witness whereof, we have caused these our letters to be made patent. Witness ourself, at Westminster, the thirtieth day of October, in the fifth year of our reign.

By writ of privy seal,

EDMUNDS.

(D)

The two following decisions are taken from the reports of GEORGE OKILL STUART, Esquire: the one having reference to the jurisdiction of the Admiralty over the river St. Lawrence; and the other, to the authority of a master of a merchant vessel to apply personal chastisement to the crew while at sea, to compel the execution of lawful orders, or to restrain a spirit of insubordination.

VICE-ADMIRALTY COURT, LOWER CANADA.

CAMILLUS—BAIRD.

26th June, 1823.

The Court of Vice-Admiralty exercises Jurisdiction in the case of a Vessel injured by Collision in the River St. Lawrence, near the City of Quebec.

JUDGMENT.—*Judge Kerr.*

This is a suit brought by the master and owner of the snow Hazard against the ship Camillus; and the libellant complains of an injury done to the Hazard on the river St. Lawrence, near the city of Quebec, by the people of the ship Camillus, who, when she was under a press of sail, so carelessly navigated her, that she ran across the bows of the Hazard, whereby she sustained damage to the amount of 200*l*. To this libel a declinatory exception has been pleaded, in which it is averred that the *locus in quo* of the pretended injury is

within the body of the county of Quebec, and solely cognizable by the Court of King's Bench for the district of Quebec.

The case of the ship *Trio*, in which, some years ago, a prohibition issued to this Court under circumstances similar to the present, has induced Mr. Jones, the claimant, to consider that the question of jurisdiction over the river St. Lawrence has been put to rest. But no appeal was instituted in that case, nor was even the Admiralty heard at all in support of its jurisdiction; and unless a question of such great importance, by which an extent of four hundred and sixty miles of sea is transferred from the Admiralty to the courts of common law, be determined by the decision of a tribunal in the last resort, I cannot admit that the question can be settled. It is only before the High Court of Admiralty, or before His Majesty in Council, where the matter can properly and finally be decided.

During the time of the French, a Court of Admiralty was established at Quebec, vested with powers more extensive than that of the Court of Vice-Admiralty; and in a maritime sense, the river St. Lawrence was then considered as part of the *altum mare*, for the "Ordonnance de la Marine" thus defines what shall be considered as the sea: "Sera réputé bord et rivage de la mer, tout ce qu'elle couvre et découvre pendant les nouvelles et pleines lunes, et jusqu'où le grand flot de mars se peut étendre sur les grèves." The maritime parts of New France, perhaps, extended further than are now claimed by this Court, sitting under an English Admiralty commission; for by it the jurisdiction of the Court of Vice-Admiralty extends to a cognizance of "every matter, cause or thing, business, or injury whatsoever, done or to be done, as well in, upon, or by the sea, or public streams, fresh waters, ports, rivers, creeks, and places overflowed whatsoever, within the ebbing and flowing of the sea, or high-water mark, as upon any of the shores or banks adjoining to them." These are the words of the commission granted by the High Court of Admiralty to the Judge of the Court of Vice-Admiralty in the year 1763, soon after the establishment of the civil government in the then province of Quebec; and such are the terms of the same commission granted so late as the year 1797 to the present Judge; so that it may be asked, by what ordinance or statute, British or Colonial, is the jurisdiction over the river St. Lawrence, as far as the flux and reflux of the tide is visible, taken away from the Admiralty and given to the Colonial Court of King's Bench? It has been said, that the royal proclamation of the year 1763, has taken away the jurisdiction over the river St. Lawrence from the Admiralty, and given it to the common law courts. But it cannot escape observation, that this proclamation (if a royal proclamation could in law deprive the Admiralty of its ancient jurisdiction), was not intended to settle and adjust the local boundaries of the Common Law and Admiralty Courts, then about to be established. Its only intention was to

designate the limits of the newly acquired province of Quebec, so as to show what portion of that territory should be placed under the care and inspection of the governor of Quebec. Nor was the proclamation of Sir Alured Clarke, of the year 1792, with reference to the Act 31st Geo. 3, c. 31, conducive to the end for which it has been cited, considering its avowed purpose was to subdivide the province of Lower Canada into counties, so as to guide the inhabitants in the exercise of their right of suffrage for members to the assembly, under the new constitution given to them by that Act. If the jurisdiction of the High Court of Admiralty over this great arm of the sea could be taken away by inference (which I deny), no such inference can be fairly drawn from these public acts. The river St. Lawrence has been assimilated to the Thames, and Quebec to London, in order to sustain the position that the river near Quebec is *infra corpus comitatûs*. But why assimilate this river more to the Thames than to the Bristol Channel, to which it bears a much stronger resemblance; or to the mouths of the Tyne, the Mersey, or the Dee, all of which are estuaries of the sea; or to the Frith of Forth, which is exclusively within the jurisdiction of the High Court of Admiralty of Scotland? The basin of Quebec has not, beyond the memory of man, as the Thames, been subject to the courts of common law, and indeed, these courts have not themselves yet existed thirty years; nor can the basin near the city be strictly holden to be a port,—the definition of which is “*locus conclusus quo importantur merces et exportantur*,” for the river is not there shut up, but flows ninety miles above it, and is actually navigable for one hundred and eighty miles.

If the Court of Vice-Admiralty have no jurisdiction in this suit for an injury done on the waters of the St. Lawrence, the commission granted to this Court is nugatory, *vana est potentia quæ non in actum venit*, and if so, where is this libellant to seek for redress?—It is clear that it cannot be found in the Court of King’s Bench, where the remedy lies only *in personam*, not *in rem*; and if the suit cannot there be entertained against the ship itself, no adequate relief can be had in that court.

The Courts of King’s Bench exercise their functions under the provincial statute 34 Geo. 3, cap. 6, by the 2nd clause of which, and that is the foundation of all their authority, it is provided, “that the said Courts, in their respective districts aforesaid, shall have original jurisdiction to take cognisance of, hear, try, and determine in the manner herein-after enacted, all causes as well civil as criminal, and where the King is party, except those purely of Admiralty jurisdiction.” The words “except those purely of Admiralty jurisdiction,” must mean something; and if they import anything, they must mean that these Common Law Courts are prohibited from taking cognisance of “any matter, cause, or thing, business or injury

whatsoever, done or to be done upon the sea or public streams, fresh waters, ports, rivers, creeks, and places overflowed whatsoever, within the ebbing and flowing of the sea ;" provided, as in this case, the proceedings are against the thing in specie.

After giving this case every consideration due to the importance of the question proposed, I have no hesitation in pronouncing a decree, maintaining the ancient jurisdiction of the Admiralty over the river St. Lawrence, and dismissing this exception with costs (a).

Declinatory exception dismissed.

21st July, 1832.

COLDSTREAM—HALL.

In an Action against the Captain of a Ship chartered by the East India Company for an Assault and False Imprisonment,—a Justification on the ground of mutinous, disobedient, and disorderly behaviour sustained.

This was a suit brought by William Warr, seaman, against the captain and first officer of the ship Coldstream, chartered by the East India Company, to recover compensation in damages for an assault and false imprisonment, alleged to have been inflicted on the voyage from China to the port of Quebec. The summary petition, besides a prayer to award 200*l.* damages, concluded for the payment of the promovent's wages, and a rescision of the articles, so far as respected him, on the ground of ill treatment. The defendants, by their responsive allegation, justified on the plea of mutinous, disobedient, and disorderly behaviour.

JUDGMENT.—*Judge Kerr.*

There has been laid before the Court, as is not unusual in suits similar to this, much contradictory evidence ; but the circumstances, as they appear to me, are the following :—

On the night of the 25th May last, when the Coldstream was near the banks of Newfoundland, she experienced a strong gale of wind, and all hands were ordered to take in the foresail ; when the gear was sufficiently up for furling, and everything prepared, the men were sent up on the yard to furl the sail. When they were upon the yard, Warr, who was aloft, called out that if the ship were not kept away before the wind they could not furl the sail. Taylor, who had

(a) See statute of Imperial Parliament, 2 Wm. 4, c. 51, s. 6. (Passed 23rd June, 1832.)

then assumed the command on deck, observed that there was a sufficient number of men on the yard to furl the sail in the hardest gale of wind that ever blew, and refused to keep the ship away. Perceiving the men meditated coming down without obeying his orders, he called out to them, "Let me see the man that lays down before the sail is furled." On this, Warr was heard to address his companions on the yard, "Let us all go down together in a body and see what he will do with us." This seems to have had its effect, and Warr and Walsh taking the lead, the men all came down upon deck. At this time the captain, on coming from his cabin, sharply remonstrated with the men for their conduct, and accused Warr of being their ringleader; he shook his clenched hand in the captain's face, telling him that he was no gentleman, and the most scandalous captain that he ever sailed with. It also appears, that on Holbrook, the second officer, interfering and desiring him to desist, he called him a liar and a half-drilled soldier, and said that the rest of the officers were no better. After much more abusive language both to the captain and his officers, Warr was, by the captain's orders, placed in irons. This happened early in the morning of 26th May; and on the same day, a court of inquiry being assembled in the cuddy, and the officers being of opinion that it became absolutely necessary for the maintenance of subordination and discipline of the ship, that Warr should be punished, he was accordingly condemned to receive three dozen of lashes at the gangway. In the necessity of this punishment Mr. Harrison, the surgeon, concurred; though he states, that being only connected with the health of the ship, he had no vote on the occasion. It further appears, that the boatswain's mate, whose duty it is to inflict such punishment, whether from sympathy towards his messmate, or from unskilfulness in the use of the instrument, only exhibited a mockery of punishment, and, as Mr. Harrison states, "dropped the oats upon his back;" and on this the captain desired Taylor to complete the punishment, which was done accordingly. This is the case, as disclosed in the evidence; though it has been attempted, on the part of the promovent, to give a colouring to the transaction which does not belong to it. It has been said that the punishment was inflicted with great severity, even with cruelty;—insomuch that the blood streamed from the back, and that the blows were not inflicted between the shoulders as usual, but on the neck, side, and loins, and as represented by Goddard, who admits he himself had been flogged, that Warr's back was, from the severity of punishment, like a jelly; but this is contradicted by the surgeon, who says that no blood was drawn, nor was the skin broken, and that, in his opinion, Warr was able to do his duty the same day. In these facts he is confirmed by Mr. Holbrook, and by Dyer and Davenport. It has been represented, that when Warr was brought on deck to be

punished, the captain seized him rudely by the lips; and that previously to his being flogged, no intimation was given to the crew as to the cause of his punishment. On both points, however, the promovent's witnesses are contradicted. On the second, by Scott, the promovent's witness, and by Mr. Solby, the third officer; and on the first point, the fact is explained away by many of the defendant's witnesses, who swear that when Warr was brought to the gangway, his language was so abusive and seditious, that the captain only put his hand on his mouth to prevent the continuation of it.

The promovent's advocates have relied on the testimony of some of the crew, who swear that the behaviour of Warr was always respectful and obedient; and particularly on that of Goddard, the boatswain's mate, who is pleased to say that Warr is a civil, honest, and quiet man, and that he never uttered a bad word. But how is this to be reconciled with the evidence of Walsh,—who appears throughout this matter to have been a co-ringleader,—for he swears that when the captain said several abusive words to Warr, he made a reply to some of them, and that he persisted in speaking until he was threatened to be gagged. Walsh does not mention the promovent's words, but other witnesses supply the deficiency; for Dyer, the sailmaker, says, that when the captain desired him to hold his peace, he told him that he had spoken in the company of gentlemen, where he, the captain, durst not show his face; and he had been flogged in a better ship, and by a better man, and by his, Captain Hall's, master. That during this time, to use the witness's own expression, Warr "bobbed his head in the captain's face." He further says, that, though he had been eleven years at sea, he never saw a captain so insulted. To the same effect is the testimony of Davenport, the carpenter, who says that Warr's conduct was mutinous, desperate, and outrageous. That when he was brought up to be flogged, his tone and manner were unruly, disrespectful; and that though he, the witness, had been ten years at sea, he never saw such unruly conduct. So says Solby, the third officer, who states that Warr insultingly said to the captain, "I have spoken to your masters on His Majesty's quarter-deck." And that on all occasions of dissatisfaction among the men, Warr was always the spokesman. In this they are corroborated by Comyn and Sewell, the midshipmen; the first of whom says, that the captain repeatedly told Warr to hold his tongue, which he refused to do, insisting to speak, and at the same time pushing his head, to use his words, in the captain's face; that he never addressed the captain by the word "Sir;" and that his gestures and deportment were so menacing, that he appeared to the witness to have thereby intended to provoke the captain to some act of violence.

The counsel for the promovent have called in question the right of the master, under any circumstances of misbehaviour, to inflict

so public an act of castigation on a seaman; but the cases of the *Agincourt* and *Lowther Castle* (a), and that of the *Inglis East Indiaman*, to which my attention has been called, clearly establish the right to punish in the mode proved to have been practised on this occasion; the master thereby assuming on himself the responsibility which belongs to the punishment, being necessary for the due maintenance of subordination and discipline, and that it was applied with becoming moderation. The same maritime principle has been adopted by a neighbouring commercial and enlightened nation, justly boasting of the freedom of its laws and institutions. Indeed, it is an arbitrary power which dire necessity sanctions, and the execution of which necessity and moderation alone can justify. On the whole, I have no hesitation in saying, that this individual, by his influence on the minds of the crew, led them to an act of disobedience and mutiny. The mutiny, it is true, was not carried so far as to lay violent hands on their commanding officer, or to put him into confinement, or to carry away the ship; yet, considering that Warr excited the men to come down from the yard in a body, in disobedience to the orders of the captain; that on the captain's saying he would shoot the first man who came down on deck, Warr scoffingly said, "and pray who will shoot the second?" I cannot, coupled with the whole of his language and behaviour, but consider him as a mover of sedition, having a direct tendency to subvert the good order and discipline of the ship. His punishment, of course, became absolutely necessary for the preservation of the whole concern. I am also of opinion, that it was in no degree excessive under the circumstances which called for it. The conduct of the captain is admitted by all the witnesses, excepting on this occasion—and that even by Walsh, to have been mild and humane; and his going down to visit Warr when in irons, and saying to him, "Warr, I never confine a man without seeing that he has a convenient place to lie down upon," is, to me, convincing proof of his reluctance to punish this individual, and a desire to forgive him if he had showed the least contrition for his conduct.

In respect to the other defendant, it must be recollected that he was the first officer of the *Coldstream*, which had a crew of about sixty men, and that on him devolved the active duties of the ship, and the enforcing of all lawful commands. Such a person must often incur the odium of the crew, and I am not surprised that his character should be represented as arbitrary and his orders unreasonable; however, it is not for the crew to pass judgment on their superior officer, and to rise up against his authority. Nor am I at all inclined to believe, contrary to the weight and respectability of the witnesses in his favour, that he was in a state of intoxication

(a) 1 Haggard's Adm. R. 271, 384.

on the night of the 25th of May, or that such is the habit of his life. I have patiently gone through the evidence on both sides, and the result is, that I decree this suit to be dismissed, and condemn the promovent to pay expenses (b).

Ussher and Aylwin, for the promovent.

Black, for the respondents.

(E)

VICE-ADMIRALS

Since the Cession of Canada, by His Most Christian Majesty, to the Crown of Great Britain, under the Treaty of Peace, concluded at Paris, the 10th day of February, 1763, with the dates of their Commissions.

James Murray	19	March,	1764
Guy Carleton	23	April,	1768
Guy Carleton	30	December,	1774
Frederick Haldimand	16	September,	1777
Guy Carleton (Lord Dorchester)	4	May,	1786
Robert Prescott	13	December,	1796
Sir James Henry Craig	9	December,	1807
Sir George Prevost	16	November,	1811
Sir Gordon Drummond	4	January,	1815
Sir John Coape Sherbrooke	1	June,	1816
Duke of Richmond	23	May,	1818
Earl of Dalhousie	19	May,	1820
Lord Aylmer	6	October,	1830
Lord Gosford	20	June,	1835
Earl of Durham	3	April,	1838
Charles Poulett Thompson (Lord Sydenham)	6	September,	1839
Sir Charles Bagot	28	September,	1841
Sir Charles Theophilus Metcalf (Lord Metcalf)	1	March,	1843
Earl of Elgin	2	October,	1846
Sir Edmund Walker Head	21	September,	1854

(b) By an Act of Congress, passed 28th September, 1850, "flogging in the Navy, and on board vessels of commerce, was abolished from and after the passing of the Act."—Acts 31 Cong. ch. 80.

(F)

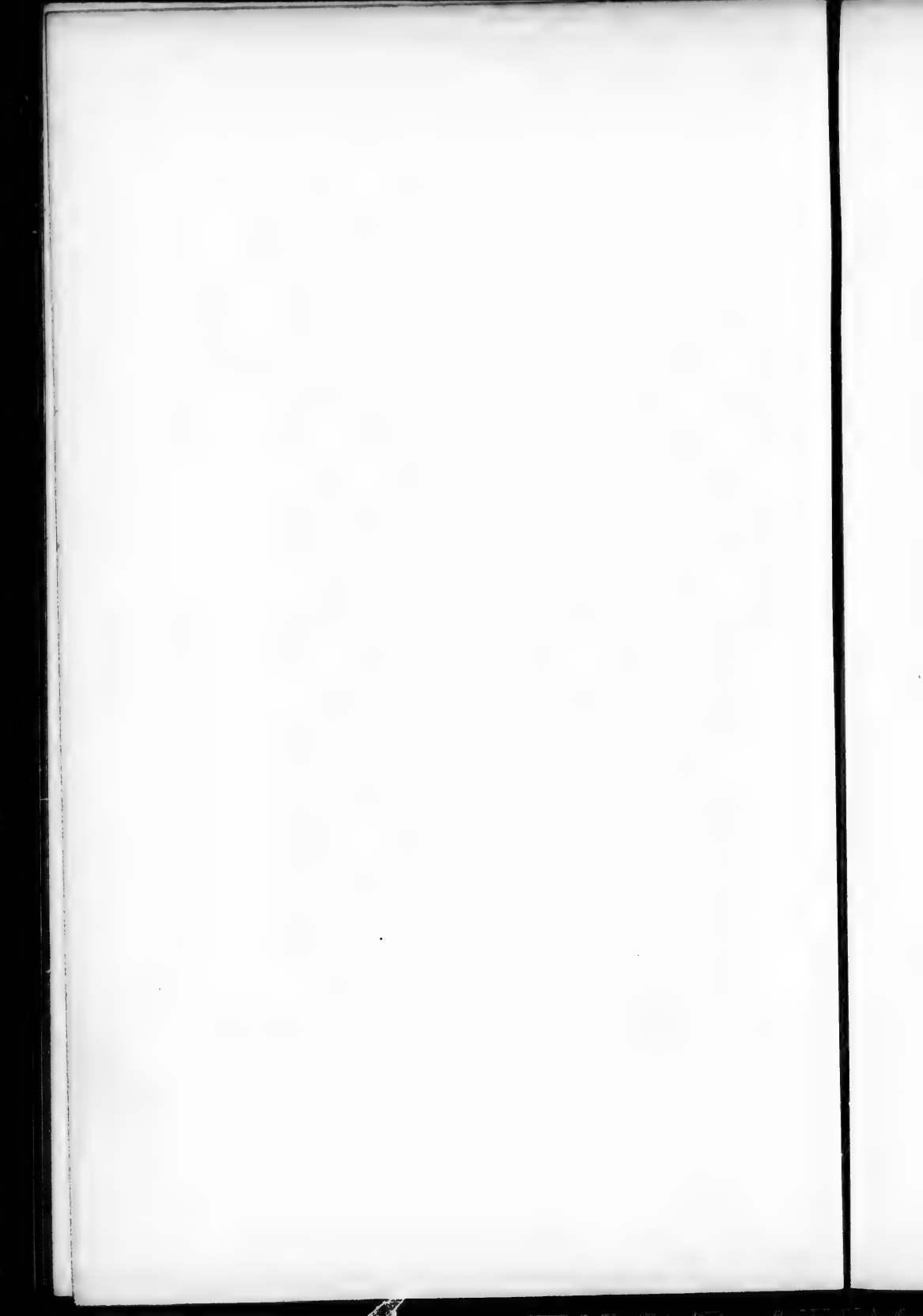
JUDGES DURING THE SAME PERIOD.

1. JAMES POTTS.—Commission under the hand of the Hon. James Murray, and the Seal of the Vice-Admiralty of the Province of Quebec, dated 24th August, 1764. This Commission was superseded by another issued in the King's name, and under the Great Seal of the High Court of Admiralty of England, bearing date the 23th April, 1768.
2. JONATHAN SEWELL.—Commission under the Great Seal of the High Court of Admiralty of England, dated 17th October, 1768 (a).
3. PETER LIVIUS.—Commission under the Great Seal of the High Court of Admiralty of England, dated the 6th April, 1775.
4. ISAAC OGDEN.—Commission under the Great Seal of the Province of Quebec, dated 24th July, 1788. The Commission of Mr. Ogden from the Admiralty of England, is stated in this Commission to bear date the 1st July, 1788.
5. JONATHAN SEWELL.—Commission under the Great Seal of the Province of Lower Canada, dated 23rd June, 1796 (b).
6. JAMES KERR.—Commission under the Great Seal of the High Court of Admiralty of England, dated the 19th August, 1797. Renewed upon the demise of the Crown by another from His late Majesty King William the Fourth, under the Great Seal of the High Court of Admiralty of England, bearing date, the 25th August, 1831.
7. HENRY BLACK.—1. Commission under the Great Seal of the Province of Lower Canada, dated 21st September, 1836.—2. This Commission was superseded by another from His late Majesty, under the Great Seal of the High Court of Admiralty of England, dated the 1st of April, 1837.—3. Renewed upon the demise of the Crown, by another issued in the name of Her Majesty Queen Victoria, under the Great Seal of the High Court of Admiralty of England, bearing date 27th October, 1838.

(a) This gentleman was Attorney-General and Judge of the Vice-Admiralty Court, at Boston, in Massachusetts, at the time of

the American Revolution.

(b) Attorney-General, son of the above-named, and afterwards Chief Justice of Lower Canada.



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COLLISION.

1. There are four probabilities under which a collision may occur.

1. It may occur from the fault or misconduct of the vessel suffering from the collision.

2. Or, the accident may have happened from unavoidable circumstances, without fault on the part of either vessel.

3. Or, both parties may be to blame, as where there has been a want of skill or due diligence on both sides.

4. Or, the loss and damage may be owing to the fault or misconduct of the vessel charged as the wrong-doer.

In the first two cases, no action lies for the damage arising from the collision.

In the third case, the law apportions the loss between the parties, as having been occasioned by the fault of both of them.

In the fourth case, the injured party is entitled to full compensation from the party inflicting the injury. *The Cumberland—Tickle*, 75; *The Nelson Village—Power*, 156.

2. Owners of vessel are not exempt from their legal responsibility, notwithstanding that their vessel was under the care and management of a pilot. *The Cumberland—Tickle*, 75.

3. Vessel giving a foul berth to another vessel, liable in damages

for collision done to the vessel to which such foul berth was given by her, although the immediate cause of the collision was a *vis major*, and no unskilfulness or misconduct was imputable to the offending vessel after giving such foul berth. *Ib.*

4. In a case of collision between two ships ascending the River St. Lawrence, the Court, assisted by a captain of the Royal Navy, pronounced for damages, *holding*, that when two vessels are crossing each other in opposite directions, and there is doubt of their going clear, the vessel upon the port or larboard tack is to bear up and heave about for the vessel upon the starboard tack. *The Nelson; Village—Power*, 156.

5. In cases of collision arising from negligence or unskilfulness in management of ship doing the injury, pilot having the control of the ship is not a competent witness for such ship, without a release, although the master is. *The Lord John Russell—Young*, 190.

6. Ship held liable for collision notwithstanding there being a pilot on board. *Ib.*

7. Where one ship is at anchor, it augurs great want of skill and attention, in a harbour like that of Quebec, for a ship under sail to be so brought too as to run foul of her, *ib.*

8. Damages awarded in case of a collision in the harbour of Quebec, *ib.*

9. A pilot act which obliges vessels going out or coming into port, to receive a pilot under a penalty or

forfeiture of half pilotage, is not compulsory, but is optional. The ship need not take a pilot if it prefer to pay the penalty or forfeiture. *The Creole*, 199.

10. The circumstance of having a pilot on board, and acting in conformity with his directions, does not operate as a discharge of the responsibility of the owner, *ib.*

11. Vessels are required of a dark night to show their position, by a fixed light, while at anchor in the harbour of Quebec; and the want of such light will amount to negligence, so as to bar a claim for any injury received from other vessels running foul of them. *The Mary Campbell—Simons*, 222.

12. Master may avail himself of the wind and tide, and sail into port by night as well as by day, *ib.*

13. Bye-laws of Trinity House, respecting lights, not abrogated by desuetude or non-user, *ib.*

14. The hoisting of a light in a river or harbour, at night, amid an active commerce, is a precaution imperiously demanded by prudence, and the omission cannot be considered otherwise than as negligence, *per se, ib.*

15. Bye-law of the Trinity House of 12th April, 1850, requires a distinct light in the fore-rigging "during the night," *ib. in note*, 225.

16. In a case of collision against a ship for running foul of a floating-light vessel, the Court pronounced for damages. *The Miramichi—Greive*, 237.

17. In such a case the presump-

tion is gross negligence, or want of skill, and the burthen is cast on the ship-master to repel that presumption, *ib.*

18. How ships moored are protected against the intrusion of ships under sail, 241.

19. The omission to have a light on board in a river or harbour at night, amounts to negligence, *per se.* *The Dahlia—Grossard*, 242.

20. Every night in the absence of a moon is a dark night in the purview of the Trinity House regulations of the 28th June, 1805, *ib.*

21. More credit is to be attached to the crew that are on the alert than to the crew of the vessel that is placed at rest, *ib.*

22. The regulations of the Trinity House require a strict construction in favour of their application, *ib.*

23. Having a light on board in such case an indispensable precaution, *ib.*

24. In a cause of collision, where the loss was charged to be owing to negligence, malice, or want of skill, the Court, with the assistance of a captain in the Royal Navy, being of opinion that the damage was occasioned by accident, chiefly imputable to the imprudence of the injured vessel, and not to the misconduct of the other vessel, dismissed the owners of the latter vessel, with costs. *The Leonidas—Arnold*, 226.

25. The general rule of navigation is, when a ship is in stays, or in the act of going about, as she becomes for the time unmanageable, it is the

duty of any ship that is near her to give her sufficient room, *ib.*

26. But, when a ship goes about very near to another, and without giving any preparatory indication from which that other can, under the circumstances, be warned in time to make the necessary preparations for giving room, the damage consequent upon want of sufficient room may arise from the fault of those in charge of the ship going about at an improper time or place, *ib.*

27. Or, in the case of darkness, fog, or other circumstances rendering it impossible for the ships to see each other so distinctly as to watch each other's evolutions, the fault may be with neither, *ib.*

28. If it be practicable for a vessel which is following close upon the track of another to pursue a course which is safe, and she adopts one which is perilous, then if mischief ensue she is answerable for all consequences. *The John Munn—Richardson*, 265.

29. In a cause of collision between two steam-vessels, the Court, assisted by a captain in the Royal Navy, pronounced for damages and costs, holding that the one which crossed the course of the other was to blame. *The By-town—Humphrey*, 278.

30. Where it appeared that the collision was the effect of mere accident, or that over-riding necessity which the law designates by the term *vis major*, action dismissed, with costs. *The Sarah Anne—Hocker*, 294.

31. In order to support an action for damages in a case of collision, it is necessary distinctly to prove that the collision arose from the fault of the persons on board of the vessel charged as the wrong-doers; or from the fault of the persons on board of that vessel, and of those on board of the injured vessel, *ib.*

32. Where both parties are mutually blameable in not taking measures to prevent accidents, the rule is to apportion equally the damages between the parties, according to maritime law as administered in the Admiralty Court, *ib.*

33. Two steamers were coming from Montreal to Quebec, and when opposite the city of Quebec, the one took the course usual on such occasions, and passed down below the lowermost wharf at the mouth of the River St. Charles, where she turned to stem the tide and come to the wharf at which she was to land her passengers; and the other did not descend so low, but made a short and unusual turn, with the intention of passing across the course of the former, and ahead of her after she had turned and was coming up against the tide:—*Held*, That the collision complained of resulted from a rash and hazardous attempt on the part of those on board of the steamer, which made such short and unusual turn to cross the course of the other, contrary to the usual practice and custom of the river, and the rules of good seamanship, for the purpose of being earlier at her wharf. *The*

Crescent—Tate; *The Rowland Hill—Ryan*, 289.

34. Manœuvres of this dangerous kind, which might, in a crowded port like that of Quebec, result in the most serious loss of property and of life, ought to be discountenanced, *ib.*

35. In this case the objectionable manœuvre appeared to have proceeded from a spirit of eager competition and from miscalculation, and not from any attempt to injure the competing vessel, *ib.*

36. The settled nautical rule is, that if two sailing vessels, both upon a wind, are so approaching each other, the one on the starboard and the other on the port tack, as that there will be a danger of collision if each continue her course, it is the duty of the vessel on the port tack immediately to give way, and the vessel on the port tack is to bear away so early and effectually as to prevent all chance of a collision occurring. *The Roslin Castle—Saddler*; *The Glencairn—Crawford*, 303.

37. The Court pronounced for damages against a vessel sailing down the River St. Lawrence, on her homeward voyage to Liverpool, running foul of another coming up in tow of a steamer, the night at the time being reasonably clear, and sufficiently so for lights to be seen at a moderate distance. *The Niagara—Taylor*; *The Elizabeth—Nesell*, 308.

38. There is no rule of law preventing vessels from entering or leaving the harbour of Quebec, at any

hour, or obliging them to keep any particular track or part of the channel in so doing, *ib.*

39. On this occasion the out-going vessel had the wind large, and as steamers are to be considered in the light of vessels navigating with a fair wind, the steamer and the out-going vessel were considered in this respect as on an equality, *ib.*

40. Vessel in tow, with a head wind and no sails, and fast to the steamer, so that she could only sheer to a certain distance on either side of the course in which she was towed by the steamer, is powerless to a very great extent, *ib.*

41. The general rule is, that where two vessels are approaching each other, both having the wind large, and are approaching each other, so that if each continued in her course there would be danger of collision, each shall port helm, so as to leave the other on the larboard hand in passing, *ib.*

42. But it is not necessary, that because two vessels are proceeding in opposite directions, there being plenty of room, the one vessel should cross the course of the other, in order to pass her on the larboard, *ib.*

43. If a vessel make every precaution against approaching danger, it is not sufficient to subject her to damage for injury to another by collision, that in the moment of danger those on board such vessel did not make use of every means that might appear proper to a cool spectator: there must be gross negligence, *ib.*

44. If the collision arose solely from the misconduct of those on board the steam tug, both the other vessels are exempt from responsibility, and the action on the part of each must be dismissed, leaving them to their recourse against the steamer, *ib.*

45. The law in such case is, that the tow is not responsible for an accident arising from the mistake or misconduct of the tug, *ib.*

46. Upon points submitted for the professional opinion of assessors, their opinion should be as definite as in a complicated case of this nature it is possible it should be, *ib.*

47. In certain cases the Court will direct the questions to be re-considered and more definitely answered, *ib.*

48. If there was no proper and sufficient look-out, and if the proper means were not adopted for avoiding collision after the time when the other vessel's lights were seen, her having taken the most seamanlike and proper course when the collision was all but inevitable does not exempt a vessel from liability, *ib.*

49. Although there may be a rule of the sea, yet a man who has the management of one ship is not allowed to follow that rule to the injury of the vessel of another, when he could avoid the injury, by pursuing a different course, *ib.*

50. Harbour-master has authority to station all ships or vessels which come to the harbour of Quebec, or haul into any wharf within the same,

and to regulate the mooring and fastening, and shifting and removal of such ships or vessels. *The New-York Packet—Marshead*, 325.

51. Where berths had been assigned or confirmed by the harbour-master to several vessels in a dock in the harbour of Quebec, and the harbour-master expressly directed the vessel proceeded against to remain in the position she then occupied, for the night, warning the master at the same time of the damage which would be incurred if he attempted to haul further in, because there was not room enough in the dock; and the master hauled his vessel forward, and as the water fell in the dock, and the space between the wharves at the water level diminished, the vessels became tightly jammed together, so that it was impossible to move them; and as the water continued to fall the pressure became so great that one of the other vessels was completely crushed, and another was suspended between the crushed vessel and the wharf, and thrown over nearly on her beam end, thereby receiving great damage, the owner of the vessel so contravening the harbour-master's orders condemned in damages and costs, *ib.*

52. By the Merchant Shipping Act (17 & 18 Vict. c. 104, ss. 296, 297) and the Steam Navigation Act (14 & 15 Vict. c. 79) as well as by the rule of the Trinity House of Quebec, when a steamer meets a sailing vessel going free, and there is danger of collision, it is the duty

of each vessel to put her helm to port and pass to the right, unless the circumstances are such as to render the following of the rule impracticable or dangerous. *The Inga—Eilertsen*, 335.

53. No sufficient excuse being found for not following this rule, a sailing vessel condemned in damages and costs for putting her helm to starboard, and passing to the left of a steam tow-boat, thereby causing collision with the vessel in tow, the steamer and her tow coming down the channel, nearly or exactly upon a line with the course of the sailing vessel, *ib.*

54. Conflict of English and American law, how to steer, *ib.*

55. Liability of steamboat for collision between vessels, one of which is towed by the steamboat. *The John Counter—Miller*, 344.

56. Cases may occur in which an accident may arise from the fault of the tow, without any error or mismanagement on the part of the tug, and in such case the tow alone must be answerable for the consequences, *ib.*

57. Cases may also occur in which both are in fault, and in such cases both vessels would be liable to the injured vessel, whatever might be their responsibility *inter se*, *ib.*

58. The Court will not enter into the discussion as to the precise point, whether on the starboard side or otherwise, in which one vessel lies to the other at the time of being discovered, *ib.*

59. Where two ships, close hauled,

on opposite tacks meet, and there would be danger of collision if each continued her course; the one on the port tack shall give way, and the other shall hold her course. *The Mary—Bannatyne*, 350.

60. She is not to do this, if by so doing she would cause unnecessary risk to the other, *ib.*

61. Neither is the other bound to obey the rule, if by so doing she would run into unavoidable or imminent danger; but if there be no such danger the one on the starboard tack is entitled to the benefit of the rule, *ib.*

62. The circumstances of the case examined, and no sufficient excuse being found for not following the rule, the vessel inflicting the injury condemned in damages and costs, *ib.*

63. The Court of Vice-Admiralty exercises jurisdiction in the case of a vessel injured by collision in the river St. Lawrence, near the City of Quebec. *The Camillus—Baird*, 383. (Doubts which had arisen on this head removed by 2 W. 4, c. 51, s. 6.)

COMMISSIONS.

1. Commission of Vice-Admiral in and over the Province of Quebec, under the Great Seal of the High Court of Admiralty of England, dated 19th March, 1764, 370.

2. Commission of Judge of the Vice-Admiralty Court in the Province of Lower Canada, under the Great Seal of the High Court of Admiralty of England, dated 27th October, 1838, 376.

3. Commission under the Great Seal of the United Kingdom of Great Britain and Ireland, for the trial of offences committed within the Admiralty jurisdiction, dated 30th October, 1841, 380.

CONFLICTING DECISIONS.

1. Conflicting decisions of Doctor Lushington in the case of *The City of London*, and of Judge Sprague, in the case of *The Osprey*. See the case of *The Inga*.

CONSIDERATION.

[See MARINERS' CONTRACT, 2.]

CONSOLATO DEL MARE.

The 148th and 149th capitoli of the *consolato del mare* declare that the sale of the ship, or the change of the master operate as a discharge of the seamen. *The Scotia—Risk*, 166.

See SALE OF SHIP; OWNERS.

CONSTRUCTION.

See MARINERS' CONTRACT.

COSTS.

Court may exercise a legal discretion as to costs. Costs refused in this case, *The Agnes—Taylor*, 57.

If a suit be brought by a seaman for wages, a settlement without the concurrence of the promoter's proctor does not bar the claim for costs: the Court will inquire whether the arrangement was or was not reasonable and just, and relieve the proctor if it were not so. *The Thetis—Watkinson*, 363.

CRIMES AND MISDEMEANORS.

12 & 13 Vict. c. 96, makes provisions for the prosecution and trial in Her Majesty's colonies of offences committed within the jurisdiction of the Admiralty.

See also 18 & 19 Vict. c. 91, s. 21.

See COMMISSIONS, 3; OFFENCES.

DAMAGE.

Where both parties are mutually blameable in not taking measures to prevent accidents, the rule is to apportion equally the damages between the parties according to the Maritime law, as administered in the Admiralty Court. *The Sarah Ann*—Hocker, 300.

DAMAGE (PERSONAL).

1. Damages awarded to a steward for assaults committed upon him by the master without cause. *The Sarah*—Sinclair, 89.

2. Those who have the command of ships are not, under the colour of discipline, to inflict unnecessary, wanton, and unlawful punishment upon those under their control, *ib.*, *in* note.

3. Responsibility of master for any abuse of his authority at sea. *The Friends*—Duncan, 118.

4. Suit for personal damage by a passenger against the master, *ib.*

5. Suit for personal damage by a cabin passenger against the master for attempting to exclude him from

the cabin. *The Toronto*—Collinson, 170.

6. Suit for, by a mariner against the master, dismissed. *The Coldstream*—Hall, 386.

DECLINATORY EXCEPTION.

In a suit for an injury done on the waters of the St. Lawrence, near the city of Quebec, a declinatory exception in which it was averred that the *locus in quo* of the pretended injury was within the body of the county of Quebec, and solely cognisable in the Court of Queen's Bench for the district of Quebec, dismissed with costs; and decree pronounced maintaining the ancient jurisdiction of the Admiralty over the river St. Lawrence. *The Camillus*—Baird, 383.

DEFAULTS.

Practice. On return of a warrant, first default made, but no prayer for a second default at the expiration of two months from the return of the warrant, proceedings discontinued thereby. *The Friends*—Duncan, 73.

DESUETUDE.

The mode of abrogating or repealing statute law by desuetude, or non-user, is unknown in the English law. *The Mary Campbell*—Simons, 223.

DETENTION.

See WAGES.

DISCRETION.

What is understood by the term

"discretion" which Courts are said to exercise. *The Agnes—Taylor*, 57.

DISRATING.

The power of the master to displace any of the officers of the ship is undoubted, but he must be prepared to show that he had lawful cause for so doing. *The Sarah—Sinclair*, 87.

The party discharged from his office is not bound to remain with the ship after her arrival at the first port of discharge, *ib.*

ERROR.

Amendment in the warrant of attachment not allowed, for an alleged error not apparent in the acts and proceedings in the suit. *The Aid—Nuthall*, 210.

EVIDENCE.

1. In a suit for wages, service and good conduct are to be presumed till disproved. *The Agnes—Taylor*, 56.

2. As to the evidence of the master in suits with seamen, or in a case of pilotage. *The Sophia—Easton*, 96.

3. In a suit for personal damage brought by a passenger against the master of a vessel, the Court will look to the education and condition in life of the persons who give the evidence, not only as entitling them to full credit for veracity, but also to greater accuracy of observation, and a greater sense of the proprieties of life. *The Toronto—Collinson*, 179.

4. An agreement varying the con-

tract of wages in the ship's articles, cannot be proved by parol evidence. *The Sophia—Weatherall*, 219.

5. The testimony of the bail of the defendant rejected, he being an incompetent witness, *ib.*

6. Persons who have the control and direction of vessels, or who are interested in clearing themselves of fault, and throwing it upon the other party, are incompetent to give evidence. *The Mary Campbell—Simons*, 224.

7. More credit is to be attached to the crew that are on the alert, than to the crew of the vessel that is placed at rest. *The Dahlia—Grossard*, 242.

8. In cases of collision it is necessary to prove fault on the part of the persons on board of the vessel charged as the wrong-doer; or, fault of the persons on board of that vessel and of those on board of the injured vessel. *The Sarah Ann—Hocker*, 300.

EXCEPTIVE ALLEGATION.

An allegation exceptive to the testimony of a witness on the ground that he did not believe in the being of a God, and a future state of rewards and punishments. *The Bytown—Humphrey*, in note, 280.

FEES.

1. All fees of office, properly so called, are presumed to have a legitimate foundation in some act of a competent authority, originally

assigning a fair *quantum meruit* for the particular service. *The John and Mary—Marshall*, 64.

2. Where the fee is established by or under the authority of an act of Parliament, the statute is conclusive as to the *quantum meruit*, *ib.*

3. Where settled by the authority of the Court, the subject is not concluded thereby, but may try the reasonableness of the sum claimed as a *quantum meruit*, before a Court of competent jurisdiction, and obtain the verdict of a jury thereon, when, and when alone, they become established fees, *ib.*

4. Since the passing of the Act of the Imperial Parliament, 1 Will. 4, c. 51, the establishment of fees in the Vice-Admiralty Court is exclusively in the King in Council: and the table of fees established under the statute having been revoked without making another, it is not competent to the Court to award a *quantum meruit* to its officers, *ib.*

5. The Order in Council of the 20th of November, 1835, passed to repeal the table of fees established under the authority of the 2 Will. 4, c. 51:—1st. Had the effect of repealing the same; 2nd. Did not give force or validity to the table of fees of 1809; 3rdly. Nor did it authorise the judge to grant fees as a *quantum meruit*. *The London—Dodson*, 140.

6. By the ancient law of England none, having any office concerning the administration of justice, shall take any fee or reward of any subject for the doing of his office, *ib.*

7. All new offices erected with new fees, or old offices with new fees, are within the stat. 34 Edw. 1, for that is a tallage upon the subject which cannot be done without common assent by an act of Parliament, *ib.*

8. Officers concerned in the administration of justice cannot take any more for doing their office than has been allowed to them by act of Parliament, *ib.*

9. Or, by immemorial usage, referred to by Lord Coke, in this instance, as in so many others, considered as evidence of a statute, or other legal beginning of the fee, *ib.*

10. These principles have at all times been recognised as fundamental principles of the law and constitution of England, *ib.*

FLOATING LIGHT.

In a case of collision against a ship for running foul of a floating light vessel, the court pronounced for damages. *The Miramichi—Grieve*, 237.

FLOGGING.

By an act of Congress, passed 28th September, 1850, flogging in the navy of the United States of America, and on board vessels of commerce, was abolished from and after the passing of that Act, 390.

FOREIGN SHIPS.

Ancient jurisdiction of the Admiralty restored by 3 & 4 Vict. c. 65, s. 6, with respect to claims of

material men for necessities furnished to foreign ships. *The Mary Jane*—*Trescowthick*, 271.

FORFEITURE AND PENALTIES.

1. Jurisdiction in the case of forfeitures and penalties incurred by a breach of any act of the Imperial Parliament, relating to the trade and revenues of the British possessions abroad.

See VICE-ADMIRALTY COURT, 5.

2. Jurisdiction in the case of forfeitures and penalties incurred by a breach of any act of the Provincial Parliament, relating to the customs as to trade or navigation.

See VICE-ADMIRALTY COURT, 6.

3. Under the act regulating the trade of the British possessions abroad, no suit for the recovery of any penalty or forfeiture to be commenced, except in the name of some superior officer of the Customs or Navy, or by his Majesty's Advocate or Attorney-General for the place where such suit shall be commenced. *The Dumfriesshire*—*Gowan*, 245.

HARBOUR OF QUEBEC.

1. Personal torts committed in the harbour of Quebec, are not within the jurisdiction of the Admiralty. *The Friends*—*Duncan*, 112.

2. Damages awarded in case of collision in the harbour of Quebec. *The Lord John Russell*—*Young*, 190.

3. A vessel which had moored alongside of another at a wharf in

the harbour of Quebec, made responsible to the other for injuries resulting from her proximity.—*The New York Packet*—*Marshead*, 325.

4. Declinatory exception overruled, in a suit for an injury done by collision in the harbour of Quebec. *The Camillus*—*Baird*, 383.

See HARBOUR MASTER.

HARBOUR MASTER.

1. The rules of the Trinity House of Quebec empower the harbour-master to station all ships or vessels which come to the harbour of Quebec, or haul into any of the wharves within the limits of the same; and to regulate the mooring and fastening, and shifting and removal of such ships and vessels; and to determine how far and in what instances it is the duty of masters and other persons having charge of such ships or vessels to accommodate each other in their respective situations, and to determine all disputes which may arise concerning the premises. *The New York Packet*—*Marshead*, 325.

2. Owner of vessel contravening harbour-master's order condemned in damages for a collision, *ib.*

JUDGE.

Commission of the Judge of the Vice-Admiralty Court of Lower Canada, 376.

Judges since the cession of the country by the crown of France to that of Great Britain, 391.

JUDGMENT.

The merits of a judgment can never be over-haled in an original suit, either at law or in equity. Till the judgment is set aside or reversed, it is conclusive, as to the subject matter of it, to all intents and purposes. *The Phæbe—Raltray* (in notes), 63.

JURISDICTION.

1. The Court has no jurisdiction in a case of pilotage, where there has been a previous judgment of the Trinity House upon the same demand. *The Phæbe—Raltray*, 59.

2. The jurisdiction of the Court in relation to claims for extra pilotage is not ousted by the Provincial stat. 45 Geo. 3, c. 12, s. 12. *The Adventure—Peverley*, 101.

3. In case of wreck in the river St. Lawrence (Rimouski), the Court has jurisdiction of salvage. *The Royal William—Pennel*, 107.

4. A great part of the powers given by the terms of the commission or patent of the Judge of the Admiralty are totally inoperative. *The Friends—Duncan*, 112.

5. The Court of Admiralty, except in prizes, exercises an original jurisdiction only on the grounds of authorised usage and established authority, *ib.*

6. It has no jurisdiction *infra corpus comitatús*, *ib.*

7. The Admiralty jurisdiction as to torts depends upon locality, and

is limited to torts committed on the high seas, *ib.*

8. Torts committed in the harbour of Quebec are not within the Admiralty jurisdiction, *ib.*

9. The Admiralty has jurisdiction of personal torts and wrongs committed on a passenger, on the high seas, by the master of the ship, *ib.*, and *The Toronto—Collinson*, 170.

10. The Admiralty entertains jurisdiction of personal torts committed by the master on a passenger, on the high seas. *The Toronto—Collinson*, 181.

11. Justices of the Peace cannot give themselves jurisdiction, in a particular case, by finding that as a fact which is not a fact. *The Scotia—Risk*, 164.

12. Collision between a steamboat and a *bateau*, both exclusively employed in the harbour of Quebec, not cognisable by this Court. *The Lady Aylmer—Nadeau*, 213.

13. The Court has no jurisdiction in a claim of property to an anchor, &c., found in the river St. Lawrence, in the district of Quebec. *The Romulus—Callender*, 208.

14. The Court has no jurisdiction for the cost of materials supplied to a vessel built and registered within the port of Quebec. *The Mary Jane—Trescowthick*, 267.

15. Where the Court has clearly no jurisdiction, it will prohibit itself, *ib.*

16. The Court of Vice-Admiralty exercises jurisdiction in the case of a vessel injured by collision in the river

St. Lawrence, near the city of Quebec.
The Camillus—Baird, 383.

17. In the case of forfeitures and penalties incurred by a breach of any Act of the Imperial Parliament relating to the trade and revenues of the British possessions abroad.

See VICE-ADMIRALTY COURT, 5.

18. In the case of forfeitures and penalties incurred by a breach of any Act of the Provincial Parliament, relating to the customs, or to trade, or navigation.

See VICE-ADMIRALTY COURT, 6.

JUSTICES OF THE PEACE.

1. Although justices of the peace exercising summary jurisdiction be the sole judges of the weight of evidence given before them, and no other of the Queen's Courts will examine whether they have formed the right conclusion from it or not, yet other Courts may and ought to examine whether the premises stated by the justice are such as will warrant their conclusion in point of law. *The Scotia—Risk*, 160.

2. Justices of the peace cannot give themselves jurisdiction in a particular case, by finding that as a fact which is not a fact, *ib.* 164.

3. Where a justice of the peace acting under the authority of the Merchant Seamen's Act (5 & 6 W. 4, c. 19, s. 17) had awarded wages to a seaman on the ground that a change of owners had the effect of discharging the seaman from his contract, this Court—considering that the proceedings had before the justice of the peace did not preclude it from again

entering into the inquiry—held that the contract of the seaman was a subsisting contract with the ship, notwithstanding the sale of her, *ib.*

4. In no form can this Court be made ancillary to the justice's court, still less be required to adopt, without examination, as legal premises on one demand, the premises which the justice's court may have adopted as legal premises on another demand, *ib.* 165.

5. In a suit for the recovery of wages under the sum of fifty pounds, justices acting under the authority of "The Merchant Shipping Act, 1854", (17 & 18 Vict. c. 104, ss. 188, 189), may refer the case to be adjudged by this Court. *The Varuna—Davies*, 357.

JUSTIFICATION.

In action by a seaman against the master, a justification on the ground of mutinous, disobedient, and disorderly behaviour sustained. *The Coldstream—Hall*, 386.

KERR (JUDGE).

1. Appointed Judge of the Vice-Admiralty Court at Quebec, by letters patent, under the Great Seal of the High Court of Admiralty of England, on the 19th of August, 1797, 152.

2. His duties discharged by a deputy from the 30th of August 1833, until his removal in October, 1834.

3. Two of his decisions in the Vice-Admiralty Court.—*Appendix*, 383.

LANDSMAN.

Quære. Whether a mere landsman shipping himself as an able-bodied seaman is entitled to any allowance whatever *The Venus—Butters*, 92.

LARBOARD.

Probable derivation of this nautical term, 235.

LAW OFFICERS.

Opinion of the law officers of the Crown in England, as to the authority of the Judge to establish a table of fees, 69.

Opinion of the law officers of the Crown in Canada, as to the practice of requiring proxies to be produced under certain circumstances, 247.

LIBEL.

All that is required in a libel for seaman's wages is to state the hiring, rate of wages, performance of the service, determination of the contract, and the refusal of payment. *The Newham—Robson*, 71.

LIEN.

1. Salvors have a right to retain the goods saved until the amount of the salvage be adjusted and tendered to them. *The Royal William—Penel*, 107.

2. In the civil and maritime law of England, no hypothecary lien exists, without actual possession, for work done or supplies furnished in England to ships owned there. *The Mary Jane—Trescowthick*, 267.

3. A maritime lien does not include or require possession. *The Hercyna—O'Brien* (in notes), 275.

4. It is defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process, *ib.* 276.

5. Where reasonable diligence is used, and the proceedings are in good faith, the lien may be enforced into whosoever possession the thing may come, *ib.*

LIGHTS.

1. The hoisting of a light in a river or harbour at night, is a precaution imperiously demanded by prudence, and the omission cannot be considered otherwise than as a negligence *per se.* *The Mary Campbell* (in note), 225.

2. A vessel at anchor in the stream of a navigable river must have at night a light hoisted to mark her position. *The Miramichi—Grieve*, 240.

3. The omission to have a light on board in a river or harbour at night amounts to negligence *per se.* *The Dahlia—Grossard*, 242.

4. Damages given for a collision, the night at the time being reasonably clear, and sufficiently so for lights to be seen at a moderate distance. *The Niagara—Taylor*, 308.

LIMITATION.

There seems to be no fixed limit to the duration of a maritime lien. *The Hercyna—O'Brien*, 274.

It is not, however, indelible, but

may be lost by negligence or delay, where the rights of third parties may be compromised, *ib.*

LOOK-OUT.

1. As to the necessity, in all cases, of a proper and sufficient look-out. *The Niagara—Taylor*, and *The Elizabeth—Nowell*, 308.

2. The ship is clearly responsible for the fault of her look-out. *The Mary Bannatyne—Ferguson*, 354.

MARINERS.

1. If a mariner be disabled in the performance of his duty, he is to be cured at the expense of the ship; but if the injury which he sustained be produced by drunkenness on his part, he must bear himself the consequences of his own misconduct. *The Atlantic—Hardenbrook*, 125.

2. Abandoning seamen, disabled in the service of the ship, without providing for their support and cure, equivalent to wrongful discharge, *ib.*

3. The seaman owes obedience to the master, which may be enforced by just and moderate correction; but the master on his part owes to the seaman, besides protection, a reasonable and direct care of his health. *The Recovery—Simkin*, 130.

4. Where a seaman can safely proceed on his voyage, he is not entitled to his discharge by reason of a temporary illness. *The Tweed—Robertson*, 132.

5. Mere sickness does not deter-

mine the contract of hiring between him and the master, *ib.* 133.

6. Seaman going into hospital for a small hurt not received in the performance of his duty, not entitled to wages after leaving the ship. *Captain Ross—Morton*, 216.

7. Mariners, in the view of the Admiralty law, are *inopes consilii*, and are under the special protection of the Court. *The Jane—Custance*, 258.

8. The jealousy and vigilance and parental care of the Admiralty, in respect to hard dealings, under forbidden aspects, with the wages of mariners, *ib.*

9. The Court of Admiralty has power to moderate or supersede agreements made under the pressure of necessity, arising out of the situation of the parties, *ib.*

10. While acting in the line of their strict duty, they cannot entitle themselves to salvage. *The Robert and Anne—Richmond*, 253.

11. For services beyond the line of their appropriate duty, or under circumstances to which those duties do not attach, they may claim as salvors, *ib.*

12. Seamen are regarded as essentially under tutelage, and every dealing with them personally by the adverse party, in respect to their suits, is scrutinised by the Court with great distrust. *The Thetis—Watkinson*, 365.

13. Negotiations with them, even before suit is brought, more to the satisfaction of the Court when entrusted to their proctors, *ib.*

14. A seaman is entitled to his

costs as well as his wages, and a settlement after suit brought, obliging him to pay his own costs, is in fact deducting so much from his wages, *ib.*

MARINERS' CONTRACT.

1. Articles not signed by the master as required by the General Merchant Seamen's Act (7 & 8 Vic. c. 112, s. 2) cannot be enforced. *The Lady Seaton*—*Spencer*, 260.

2. A promise made by the master, at an intermediate port on the voyage, to give an additional sum, over and above the stipulated wages in the articles, is void for want of consideration. *The Lockwoods*—*Lawton*, 123.

3. Change of owners, by the sale of the ship at a British port, does not determine a subsisting contract of the seamen, and entitle them to wages before the termination of the voyage. *The Scotia*—*Risk*, 160.

4. Where a voyage is broken up by consent, and the seamen continue, under new articles, on another voyage, they cannot claim wages under the first articles subsequent to the breaking up of the voyage. *The Sophia*—*Weatherall*, 219.

5. Whether, when a merchant ship is abandoned at sea *sine spe revertendi*, in consequence of damage received and the state of the elements, such abandonment taking place *bonâ fide* and by order of the master, for the purpose of saving life, the contract entered into by the mariners is by such circumstances entirely put an end to; or whether it is merely interrupted, and capably, by the occurrence of any and

what circumstances, *cf* being again called into force. *Florence* (in notes), 254.

6. Where seamen shipped for "a voyage from the port of Liverpool to Constantinople, thence (if required) to any port or places in the Mediterranean or Black Seas, or wherever freight may offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom, or for a term not to exceed twelve months," and the ship went to Constantinople in prosecution of the contemplated voyage, and then returned to Malta, whence, instead of going to a final port of destination, in the United Kingdom, she came direct to Quebec in search of freight, which she had failed to obtain at the ports at which she had previously been, it was *held* that coming to Quebec could not be considered a prosecution of the voyage under the 94th section of the Mercantile Marine Act of 1850, re-enacted by the 190th section of the Merchant Shipping Act, 1854. *The Varuna*—*Davies*, 357.

7. The words "nature of the voyage" must have such a rational construction as to answer the leading purposes for which they were framed, viz., to give the mariner a fair intimation of the nature of the service in which he engages, *ib.* (in note) 361.

8. The words "or wherever freight may offer" are to be construed with reference to the previous description of the voyage, *ib.* 360.

9. The words "or elsewhere" must be construed either as void for uncer-

tainty, or as subordinate to the principal voyage stated in the preceding words, *ib.* 361.

MARITIME LIEN.

* 1. The definition and nature of maritime liens, their duration and extinguishment. *The Hercyna — O'Brien* (in note), 275.

2. There seems to be no fixed limit to the duration of a maritime lien; but must be enforced within an equitable period, considering the nature of the lien, and the employment of the vessel, and the changes of interest therein, *ib.*

See LIEN.

MASTER OF SHIP.

1. Master admitted as a witness in a case of pilotage. *The Sophia — Easton*, 96.

2. A promise made by the master at an intermediate port on the voyage to give an additional sum over and above the stipulated wages in the articles, is void for want of consideration. *The Lockwoods — Lawton*, 123.

3. Upon the death of the master during the voyage, the mate succeeds him as *hæres necessarius*. *The Brunswick — Tully*, 139.

4. Possession of a ship awarded to the master appointed by the owner to the exclusion of the master named by the shippers of the cargo. *The Mary and Dorothy — Teasdale*, 187.

5. By the 17 & 18 Vict. c. 104, s. 240, power is given to any Court having Admiralty jurisdiction in any

of Her Majesty's dominions to remove the master of any ship, being within the jurisdiction of such Court, and to appoint a new master in his stead, in certain cases, *ib.* 189.

6. The master of a merchant vessel may apply personal chastisement to the crew whilst at sea, the master thereby assuming to himself the responsibility which belongs to the punishment being necessary for the due maintenance of subordination and discipline, and that it was applied with becoming moderation. *The Coldstream — Hall*, 386.

See ADMIRALTY; EVIDENCE; JURISDICTION; PATRONE; PASSENGER; PERSONAL DAMAGE; SEAMEN; TORTS; VICE-ADMIRALTY; WITNESS.

MATE.

1. The mate of a vessel is chargeable for the value of articles lost by his inattention and carelessness, and the amount may be deducted from his wages. *The Papineau — Maxwell*, 94.

2. A chief mate suing for wages in the Court of Admiralty is bound to show that he has discharged the duties of that situation with fidelity to his employers, *ib.* (in note).

3. Amongst the most important of these duties are a due vigilance, care, and attention to preserve the cargo, *ib.* (in notes), 95.

4. Where a second mate is raised to the rank of a chief mate by the master during the voyage, he may be reduced to his old rank by the

master for incompetency, and thereupon the original contract will revive. *The Lydia—Brunton*, 136.

5. Death of the master and the substitution of the mate in his place does not operate as a discharge of the seamen. *The Brunswick—Tully*, 139.

6. By the maritime law, upon the death of the master during the voyage, the mate succeeds as *hæres necessarius*, *ib.*

MATERIAL MEN.

1. Persons furnishing supplies to ships in this country, technically called material men, have not a lien upon the ship for the amount of their supplies, and the Court has no jurisdiction to enforce demands of this nature. *The Mary Jane—Trescowthick*, 267.

2. Have no lien upon British ships without actual possession, *ib.* 270.

3. A vessel built and registered in a British possession is not a "foreign sea-going vessel" within the provisions of the 3 & 4 Vict. c. 65, *ib.* 272.

MERCHANT SHIPPING ACT, 1854.

1. Rule as to ships meeting each other, in 296th section, cited. *The Inga—Eilertsen*, 340.

2. Construction of the Act, as to agreements to be made with seamen. *The Varuna—Davies*, 357.

MERGER.

Where there has been a recovery in

the Trinity House, the original consideration is merged in the judgment of the Trinity House. *The Phæbe—Raltray*, 59.

MISCONDUCT.

1. In a suit for wages, service and good conduct are presumed till disproved. *The Agnes—Taylor*, 56.

2. Defence grounded on misconduct of seaman must be specially pleaded, with proper specification of the acts thereof, *ib.* 56, 57.

3. In an action against the master for inflicting bodily correction upon an offending mariner, a justification on the ground of mutinous, disobedient, and disorderly behaviour sustained. *The Coldstream—Hall*, 386.

MOORING.

A vessel which moors alongside of another at a wharf or elsewhere, becomes responsible to the other for all injuries resulting from her proximity, which human skill or prevention could have guarded against. *The New York Packet—Marshall* (in note), 329.

NAVIGATION.

See COLLISION, *passim*.

NON-USER.

See DESUETUDE.

OFFENCES.

Commission for the prosecution and trial of offences committed within

the jurisdiction of the Admiralty, 380.

ONUS PROBANDI.

1. Where a ship at anchor is run down by another vessel under sail, the *onus probandi* lies with the vessel under sail to show that the collision was not occasioned by any error or default upon her part. *The Miramichi*—*Grieve*, 240.

2. Where a vessel at anchor is run down by another, the onus lies on the latter to prove the collision arose from some cause which would exempt her from liability. *The John Munn*—*Richardson* (in note), 266.

OPTION.

Electa una via, non datur recursus ad alteram.

Where a party had his option to proceed either before the Trinity House or before the Admiralty, and made his option of the former, by that he must abide as well in respect of the execution of the judgment as in the obtaining of it. *The Phæbe*—*Ralray*, 59.

ORDERS IN COUNCIL.

1. At the Court of St. James's the 27th June, 1832; 6.

At the Court at Brighton the 20th November, 1835, referred to, 64, 141.

2. Cases upon:—

The John and Mary, Marshall, 64.

The London, Dodson, 140.

See FEES; PRACTICE; RULES AND REGULATIONS; TABLE OF FEES.

OWNERS.

1. Owners of vessels are not exempt from their legal responsibility, though their vessel was under the care and management of a pilot. *The Cumberland*—*Tickle*, 75.

2. Change of the owner, by the sale of a ship at a British port, does not determine a subsisting contract of seamen, and entitle them to wages before the termination of the voyage. *The Scotia*—*Risk*, 160.

3. The Court of Admiralty has authority to arrest a ship upon the application of the owner, in a case of possession. *The Mary and Dorothy*—*Teasdale*, 187.

4. Having a pilot on board, and acting in conformity with his directions, does not discharge responsibility of owner. *The Lord John Russell*—*Young*, 190.

PASSENGER.

1. The relation of master and passenger produces certain duties of protection by the master analogous to the powers which the law vests in him as to all the persons on board his ship; any wilful violation of which duties, to the personal injury of the passenger, entitles the latter to a remedy in the Admiralty, if arising on the high seas. *The Friends*—*Duncan*, 118.

2. Unless in cases of necessity, the master cannot compel a passenger to keep watch, *ib.* 120.

3. Master may restrain a passenger

by force, but the cause must be urgent, and the manner reasonable and moderate, *ib* 122.

4. The authority of the master will always be fully supported by the Courts so long as it is exercised within its just limits. *The Toronto—Collinson*, 179.

5. Damages awarded against a master of a vessel for having, in a moment of ill-humour, attempted to deprive a cabin passenger of his right to the use of the quarter-deck and cabin, and to separate him from the society of his fellow passengers, *ib*. 180.

See ADMIRALTY; ASSAULT; JURISDICTION; DAMAGE PERSONAL; VICE-ADMIRALTY.

PATRONE.

Import of the term in the Mediterranean States. *The Scotia—Risk*, 166.

PENALTY.

If any act be prohibited under a penalty, a contract to do it is void. *The Lady Seaton—Spencer*, 263.

PERSONAL DAMAGE.

See DAMAGE, PERSONAL.

PILOTS.

1. A pilot is a mariner, and as such may sue for his pilotage in the Vice-Admiralty Court; see 2 Will. 4, c. 51; 4.

2. A pilot who has the steering of a ship is liable to an action for an injury done by his personal miscon-

duct, although a superior officer be on board. *The Sophia—Easton*, 96.

3. Damage occasioned to the ship by the misconduct of the pilot may be set off against his claim for pilotage, *ib*.

4. In cases of pilotage, where there has been a previous judgment of the Trinity House upon the same cause of demand, the Court has no jurisdiction. *The Phœbe—Raltray*, 59.

5. Persons acting as pilots are not to be remunerated as salvors. *The Adventure—Peverley*, 101.

6. Pilots may become entitled to extra pilotage, in the nature of salvage, for extraordinary services rendered by them, *ib*.

7. The jurisdiction of the Court is not ousted in relation to claims of this nature by the Provisional Stat. 45 Geo. 3, c. 12, s. 12, *ib*.

8. Owners of vessels are not exempt from their legal responsibility, though their vessel was under the care and management of a pilot. *The Cumberland—Tickle*, 75.

9. Exclusive duty of pilot in charge to direct the time and manner of bringing a vessel to anchor. *The Lord John Russell—Young*, 190.

10. Pilot having control of ship, not a competent witness for such ship without a release, *ib*.

11. Ship held liable for collision notwithstanding there being a pilot on board, *ib*.

12. Having a pilot on board, and acting in conformity with his directions, does not discharge responsibility of owner. *The Creole*, 199.

PILOT ACTS.

1. The English cases by which the owners are exempted from responsibility, where the fault is solely and exclusively that of the pilot, not shared in by the master or crew, are based upon the special provision of the English Pilotage Acts. *The Cumberland—Tickle* (in note), 31.

2. Construction of the Lower Canada Pilot Act (45 Geo. 3, c. 12), *ib.*

3. Construction of the Liverpool Pilot Act, *ib.*

4. Construction of the Pennsylvania Pilot Act, 199.

5. The provisions of the General Pilot Act of England (6 Geo. 4, c. 125), 82.

6. The whole of this Act is repealed by "The Merchant Shipping Repeal Act, 1854" (17 & 18 Vict. c. 120).

7. Limitation of the liability of owners where pilotage is compulsory, re-enacted by "The Merchant Shipping Act, 1854" (17 & 18 Vict. c. 104, s. 388).

8. Applies to the United Kingdom only, *ib.*, s. 330.

PLEADING.

1. The allegations of a party must be such as to apprise his adversary of the nature of the evidence to be adduced in support of them. *The Agnes—Taylor*, 56.

2. Less strictness required in pleading than in other courts, *ib.*

3. All the essential particulars of the defence should be distinctly set forth in the pleadings, *ib.*

4. The evidence must be confined to the matters put in issue, and the decree must follow the allegations and the proofs, *ib.*

5. The defendant not pleading a judgment rendered in another court, waives such ground of defence, *ib.*

6. Where the misconduct of a mariner is relied on as a ground of defence in an action for wages, it should be specifically put in issue, *ib.*

7. Demand for watch, &c., taken by the master from the seamen's chest, may be joined to the demand for wages. *The Sarah—Sinclair*, 87.

8. In a cause of damage, in which the proceedings were by plea and proof, acts appearing on the face of the libel to have been committed at a place which is not within the jurisdiction of the Court, rejected as inadmissible. *The Friends—Duncan*, 112.

See LIBEL.

PORT.

Probable derivation of this nautical term. *The Leonidas—Arnold* (in note), 235.

POSSESSION.

1. Possession of a ship awarded to the master appointed by the owner, to the exclusion of the master named by the shippers of the cargo. *The Mary and Dorothy—Teasdale*, 187.

2. Power given to any Court having Admiralty jurisdiction in any of her

Majesty's dominions to remove the master of any ship, being within the jurisdiction of such court and to appoint a new master in his stead, 17 & 18 Vict. c. 104, s. 240, *ib.* (in note), 189.

PRACTICE.

1. The practice to be observed in suits and proceedings in the courts of Vice-Admiralty abroad, is governed by certain rules and regulations established by an order in council, under the 2 Will. 4, c. 51, 1 to 52.

2. The Court will require the libel to be produced at a short day, if the late period of the season, or other cause, renders it necessary. *The New-
ham—Robson*, 70.

3. Demand for watch, &c., taken by the master from the seaman's chest, may be joined to the demand for wages. *Sarah—Sinclair*, 87.

4. When the Judge has any doubts in regard to the manner of navigating ship's course, position, and situation, he will call for the assistance of persons conversant in nautical affairs to explain. *The Cumberland—Tickle*, 78.

5. Probatory terms are in general peremptory, but may be restored for sufficient cause. *The Adventure—
Peeverley*, 99.

6. Upon points submitted for the professional opinion of nautical persons, their opinion should be as definite as possible. *The Niagara—
Taylor; The Elizabeth—Nowell*, 320.

7. In certain cases the Court will direct the questions to be recon-

sidered and more definitely answered, *ib.*

8. As to the practice of examining witnesses under a release. *The Lord
John Russell—Young*, 194.

9. Amendment in the warrant of attachment not allowed for an alleged error not apparent in the acts and proceedings in the suit. *The Aid—
Nuthall*, 210.

10. Suppletory oath ordered in a suit for subtraction of wages. *The
Josepha—McIntyre*, 212.

11. Where the Court has clearly no jurisdiction, it will prohibit itself. *The Mary Jane—Trescowthick*, 267.

12. In salvage cases the protest made by the master, containing a narrative of facts when they are fresh in his memory, should be produced. *The Electric—Molton*, 333.

13. In courts of civil law the parties themselves have strictly no authority over the cause after their regular appearance by an attorney or proctor. *The Thetis—Wilkinson*, 365.

14. The attorney or proctor is so far regarded as the *dominus litis*, that no proceeding can be taken except by him, or by his written consent, until a final decree or revocation of his authority, *ib.*

See APPEAL; ASSESSORS; ATTACHMENT, Nos. 1, 2, 3, 4; DEFAULTS; EVIDENCE; PLEADING; PROXIES; WITNESS.

PRESUMPTION.

1. Where a ship at anchor is run down by another vessel under sail,

the presumption is that the latter vessel is in fault. *The Miramichi—Grieve*, 240.

2. If the protest be not produced, salvors are entitled to the inference that it is withheld because it would be too favourable to them. *The Electric—Molton*, 333.

PRIMROSE (HON. FRANCIS WARD).

1. Was appointed Deputy-Judge, Surrogate, and Commissary of the Vice-Admiralty Court for Lower Canada, by an instrument under the hand and seal of the Hon. James Kerr, Judge thereof, on his being about to proceed to England, dated the 30th of August, 1833.

2. Discharged the duties of judge from that time until the removal of Mr. Kerr, in October, 1834.

3. Continued afterwards to do so, under the authority of the Imperial Act (56 Geo. 3, c. 82) to render valid the judicial acts of Surrogates of Vice-Admiralty Courts abroad, during vacancies in office of Judges of such Courts,—down to the time of the appointment of Mr. Kerr's successor, on the 21st of September, 1836. See cases of *THE JOHN AND MARY* and *THE LONDON*.

PROBATORY TERM.

See *PRACTICE*, 5.

PROCTOR.

A settlement without the concurrence or knowledge of the promoter's proctor, does not bar the claim for costs; and the Court will inquire

whether the arrangement was or was not reasonable and just, and relieve the proctor if it were not. *The Thetis—Watkinson*, 363.

PROTEST.

The production of the protest is necessary in all cases, whether of collision or salvage, but more particularly so in cases of salvage. *The Electric—Molton*, 333.

PROXIES.

In order to prevent proctors from proceeding in causes, on instructions from parties not having a legal *personæ standi* to prosecute a cause, the Court may require the production of proxies. *The Dumfriesshire—Gowan*, 245.

Report of the law officers of the Crown in Canada on this subject, *ib.* (in notes), 247.

RECEIPT IN FULL.

1. A receipt in full is not taken as conclusive in the Court, but is open to explanation, and upon satisfactory evidence may be restrained in its operation. *The Sophia—Weatherall*, 219.

2. When receipts and discharges of claims are given by the crew of a vessel, they are not to be taken in the Admiralty as conclusive; and where the settlements and receipts are made under undue and oppressive influence, and without free consent, they ought not to bar an equitable claim for com-

pensation beyond what the crew have received. *The Jane—Custance*, 256.

3. In actions by seamen for wages the Court will not of course sanction settlements made with parties out of court, unless their proctors are consulted and approve them. *The Thetis—Watkinson*, 363.

See COSTS—PROCTOR.

RECOUPMENT.

1. The mate of a vessel is chargeable for the value of articles lost by his inattention, and the amount may be deducted from his wages. *The Papineau—Maxwell*, 94.

2. Damages occasioned to the ship by the mismanagement of the pilot may be set off against his claim for pilotage. *The Sophia—Easton*, 96.

REGISTRAR AND MERCHANTS.

Cases referred to:—

The Lord John Russell, 198.

John Munn, 266.

Crescent, 293.

Roslyn Castle, 307.

RELEASE.

Witnesses examined under a release. *The Lord John Russell—Young*, 194.

RES JUDICATA.

1. Defence grounded on a *res judicata* must be specially pleaded. *The Agnes—Taylor*, 53.

2. Where there had been a previous judgment of the Trinity House upon the same cause of demand, the Court declined to exercise jurisdiction. *The Phoebe—Raltray*, 59.

3. A Court of competent jurisdiction having decided the facts which were directly in issue, the party is estopped from trying the same facts again, *ib.* 60.

4. To allow two several suits for the same cause of action in two several Courts would lead to a worse than useless multiplication of law-suits, would be highly vexatious to parties, and would subject Courts to discredit from contrariety of co-existing decisions of equal authority in separate tribunals upon the same matters, *ib.* 61.

REVENUE CASES.

See VICE-ADMIRALTY COURT, 5, 6.

RIGHT OF RETENTION.

See LIEN.

RIVER ST. LAWRENCE.

See ADMIRALTY, 6, 8, 11, 17; COLLISION, 4, 8, 11, 16; JURISDICTION, 3, 8, 12, 13, 16; VICE-ADMIRALTY COURT, 2, 4, 10, 12, 19.

RULE OF THE SEA.

1. It is a generally received opinion among seamen, that it is imprudent and improper to anchor directly a-head or directly a-stern of another vessel in the direction of the tides or prevailing winds, unless at such or so great a distance as would allow time for either vessel to take measures to avoid collision in the event of either driving from her anchors. *The Cumberland—Tickle*, 79.

2. It is moreover the usual practice

not to anchor near to and directly in another vessel's hawse, that is, directly a-head and in the direction of the wind and tide; and in books which treat on seamanship it is mentioned as a thing to be avoided, not only to prevent accidents from driving in bad weather, but also in order that either vessel may be able to get under weigh without risk of collision with the other, *ib.* 80.

3. It is a rule universally received among seamen, and to be found in books on seamanship, that when there is doubt, the vessel on the larboard tack is to bear up or heave about for the vessel on the starboard tack. *The Nelson Village—Power*, 157.

4. When a ship is in stays, or in the act of going about, she becomes for the time unmanageable, and in this case it is the duty of every ship that is near her to give sufficient room. *The Leonidas—Arnold*, 229.

5. When a ship goes about very near to another, it is her duty to give a preparatory indication, from which that other can, under the circumstances, be warned in time to make the necessary preparations for giving room, *ib.*

6. When two vessels are approaching each other, both having the wind large, and are approaching each other so that if each continued in her course there would be danger of collision, each shall port helm so as to leave the other on the larboard hand in passing. *The Niagara—Taylor*, 315.

7. But it is not necessary, that because two vessels are proceeding in

opposite directions, there being plenty of room, the one vessel should cross the course of the other, in order to pass her on the larboard, *ib.*

8. It is the duty of every vessel seeing another at anchor, whether in a proper or improper place, and whether properly or improperly anchored, to avoid, if practicable and consistent with her own safety, any collision. *The John Munn—Richardson* (in notes), 266.

9. One who has the management of a ship is not allowed to follow that rule to the injury of the vessel of another, when he could avoid the injury by a different course. *The Niagara—Taylor*; *The Elizabeth—Nowell*, 323.

10. Rule as to ships meeting each other. Merchant Shipping Act, 1854, which came into operation 1st May, 1855 (17 & 18 Vict. c. 104, s. 296). *The Inga—Eilertsen*, 335; COLLISION, 53.

11. Where two ships, close hauled, on opposite tacks meet, and there would be danger of collision if each continued her course, the one on the port tack shall give way, and the other shall hold her course, unless by so doing she would cause unnecessary risk to the other. *The Mary Banatyne*, 353.

Nor is the other bound to obey the rule, if by so doing she would run into unavoidable or imminent danger; but if there be no such danger, the one on the starboard tack is entitled to the benefit of the rule, *ib.*

RULES AND REGULATIONS.

1. Made in pursuance of the imperial statute, 2 W. 4, c. 51, touching the practice to be observed in suits and proceedings in the several courts of Vice-Admiralty abroad, and established by his late Majesty's Order in Council, at the Court of St. James's, the 27th of June, 1832, 1 to 51.

2. Supplementary rules established by her Majesty's Order in Council, at the Court at Buckingham Palace, the 2nd of March, 1848, 52.

SALE OF SHIP.

Sale of ship has not the effect of discharging seamen from their engagement. *The Scotia—Risk*, 160.

SALVAGE.

1. Persons acting as pilots are not to be remunerated as salvors. *The Adventure—Peverley*, 101.

2. Under extraordinary circumstances of peril or exertion, pilots may become entitled to an extra-pilotage, as for a service in the nature of a salvage service, *ib.*

3. Such extra-pilotage decreed to a branch pilot for the river St. Lawrence for services by him rendered to a vessel which was stranded at Mille Vaches, in the river St. Lawrence, on her voyage to Quebec, *ib.*

4. In a case of wreck in the river St. Lawrence (*Rimouski*), the Court has jurisdiction of salvage. *The Royal William—Pennel*, 107.

5. In settling the question of salvage, the value of the property, and the nature of the salvage service, are both to be considered, *ib.*

6. The circumstances of the case examined, and the service declared to be a salvage service, and not a mere *locatio operis*, though an agreement upon land was had between the parties in relation to such service, *ib.*

7. Salvors have a right to retain the goods saved until the amount of the salvage be adjusted and tendered to them, *ib.* 111.

8. Compensation decreed to seamen out of the proceeds of the materials saved from the wreck by their exertions. *The Sillery—Hunter*, 182.

9. Seamen, while acting in the line of their strict duty, cannot entitle themselves to salvage. But extraordinary events may occur, in which their connexion with the ship may be dissolved *de facto*, or by operation of law, or they may exceed their proper duty, in which cases they may be permitted to claim as salvors. *The Robert and Anne—Richmond*, 253.

10. Whether when a merchant ship is abandoned at sea, *sine spe revertendi aut recuperandi*, in consequence of damage received and the state of the elements, such abandonment taking place *bonâ fide* and by order of the master, for the purpose of saving life, the contract entered into by the mariners is, by such circumstances, entirely put an end to; or, whether it is merely interrupted, and capable, by the occurrence of any and what circumstances, of being

again called into force. *The Florence* (in note to *Robert and Anne*), 254.

11. Salvage allowed by Judge *Kerr* to the chief and second mates, and carpenter, for their meritorious services, out of the proceeds arising from the sale of the articles saved from the wreck. *The Flora*—*Wilson*, 255.

12. In a case of very meritorious service rendered by two seamen, and two young men to a vessel in the river St. Lawrence, the Court awarded one-sixth part of the property saved, and also their costs and expenses. *The Electric*—*Molton*, 330.

See EVIDENCE; PRACTICE; PROTEST.

SEAMEN.

See MARINERS.

SEAMEN'S WAGES.

In the course of a voyage the master promises the seamen an additional sum over and above the stipulated wages in the articles. This promise is void for want of consideration. *The Lockwoods*—*Lawton*, 123.

See RECEIPT IN FULL.

SEMI-NAUFRAGIUM.

See WAGES, 7 and 9.

SHIP.

See ADMIRALTY; ATTACHMENT; BATEAU; COLLISION; CONFLICTING DECISIONS; CONSOLATO DEL MARE; DAMAGE; DISRATING; EVIDENCE; FLOATING LIGHT; FOREIGN SHIPS; HARBOUR MASTER; HARBOUR OF QUEBEC; JURISDICTION; JUSTICE

OF THE PEACE; LANDSMAN; LARBOARD; LIEN; LIGHTS; LOOK-OUT; MARINERS' CONTRACT; MARITIME LIEN; MASTER OF SHIP; MATERIAL MEN; ONUS PROBANDI; OWNERS; PATRONE; PILOTS; POSSESSION; PRESUMPTION; PROTEST; RIVER ST. LAWRENCE; RULE OF THE SEA; SALE OF SHIP; SALVAGE; STEAM TUGS; TRINITY HOUSE; TUG AND TOW; VIS MAJOR; WAGES.

SHIP'S ARTICLES.

See MARINERS' CONTRACT.

SICKNESS.

See MARINERS; WAGES.

SOLICITOR-GENERAL.

See ATTORNEY-GENERAL.

STARBOARD.

Probable derivation of this nautical term, 235.

STATUTE.

1. The repeal of a repealing statute has generally the effect of reviving the original statute. *The London*—*Dodson*, 151.

2. A statute does not lose its force by desuetude or non-user. *The Mary Campbell*—*Simons*, 223.

STATUTES.

37 Geo. 3, c. 71.

52 Geo. 3, c. 39.

6 Geo. 4, c. 125.

2 Will 4, c. 51, To regulate the practice and the fees in the Vice-Admiralty Courts abroad,

and to obviate doubts as to their jurisdiction.

- 3 & 4 Will. 4, c. 41, Appeals from the Vice-Admiralty Courts abroad, to be made to his Majesty in Council, and not to the High Court of Admiralty of England.
- 3 & 4 Vict. c. 65, To improve the practice and extend the jurisdiction of the High Court of Admiralty of England.
- 6 & 7 Vict. c. 38, Further regulations for facilitating the hearing of appeals, and other matters, of the Judicial Committee of the Privy Council.
- 7 & 8 Vict. c. 69, Extending jurisdiction and powers of her Majesty's Privy Council.
- 8 & 9 Vict. c. 87, None of her Majesty's subjects to hoist the union jack or pendants, &c., usually worn in her Majesty's ships, and prohibited to be worn by proclamation of 1st of January, 1801, under a penalty not exceeding 100*l*. Jurisdiction of the High Court of Admiralty of England, and of the Vice-Admiralty Courts in her Majesty's Colonies in such cases.
- 16 & 17 Vict. c. 107, Consolidating laws relating to the customs of the United Kingdom, and certain laws relating to the trade and navigation of the British possessions.
- ss. 183 to 190, Penalties and forfeitures incurred in the

British possessions in America, to be recovered in any Court of Record or of Vice-Admiralty, having jurisdiction where the same may have been incurred.

- 17 & 18 Vict. c. 78, The Admiralty Court Act, 1854.
- 17 & 18 Vict. c. 107, The Merchant Shipping Act, 1854.
- 17 & 18 Vict. c. 120, The Merchant Shipping Repeal Act, 1854.
- 18 & 19 Vict. c. 91, The Merchant Shipping Act Amendment Act, 1855.

STEAMER.

1. If it be practicable for a steamer which is following close upon the track of another to pursue a course which is safe, and she adopts one which is perilous, then, if mischief ensue, she is answerable for all consequences. *The John Munn—Richardson*, 265.

2. In a cause of collision between two steamers, the Court, assisted by a captain in the Royal Navy, pronounced for damages and costs, holding that the one which crossed the course of the other was to blame. *The By-Town—Humphrey*, 278.

3. Making short and unusual turn to cross the course of another steamer coming into port, contrary to the usual practice and custom of the river, and the rules of good seamanship, condemned in damages. *The Crescent—Tate*, 289.

4. Such dangerous manœuvres in a crowded port like that of Quebec, to be discountenanced, *ib.* 293.

5. Though proceeding only from a spirit of eager competition, and from miscalculation rather than from any attempt to injure the competing vessel, *ib.*

6. Steamers are to be considered in the light of vessels navigating with a fair wind. *The Niagara—Taylor; The Elizabeth—Nowell*, 314.

7. Every steam-ship when navigating any narrow channel shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steam-ship. The Merchant Shipping Act, 1854. *The Inga—Eilertsen*, 335.

8. When two or more steam-boats of unequal speed shall be pursuing the same course within the limits of the port of Quebec, the slowest boat, if a-head, shall draw on the left and allow the one at the stern to pass on the starboard side.

See *By-law of Trinity House of Quebec of 12th of October, 1855.*

STEAM NAVIGATION ACT.

English Steam Navigation Act (14 & 15 Vict. c. 79) cited. *The Inga—Eilertsen*, 339.

STEAM-TUGS.

1. Sailing vessel running foul of another coming up the St. Lawrence in tow of a steam-tug, condemned in damages. *The Niagara—Taylor*, 308.

2. A vessel in tow, with a head wind and no sails, and fast to a steamer, is powerless to a very great extent; and can only sheer to a cer-

tain distance on either side of the course in which she is towed, *ib.* 314.

3. If the misconduct of those on board the tug be the sole cause of the collision, both the other vessels are exempt from responsibility, and the recourse of the injured vessel is against the tug, *ib.* 319.

4. The tow is not responsible for an accident arising solely from the mistake or misconduct of the tug, *ib.*

5. Sailing vessel condemned in damages and costs for putting her helm to starboard, and passing to the left a steam tow-boat, thereby causing collision with the vessel in tow; the steamer and her tow coming down the channel nearly or exactly upon a line with the course of the sailing vessel. *The Inga—Eilertsen*, 335.

6. Liability of a steam-tug for collision between vessels, one of which was towed by the steamer. *The John Counter—Miller*, 344.

7. Where the accident arises from the fault of the tow, without any error or mismanagement on the part of the tug, the former alone is answerable, *ib.* 348.

8. If both be in fault, both vessels are liable to the injured vessel, whatever may be their responsibility *inter se*, *ib.*

STEWARD.

Steward displaced and punished without cause, is not bound to serve as a cook, and may recover his wages. *Sarah—Sinclair*, 87.

STRANDING.

See WAGES, 7.

SUPPLETORY OATH.

See PRACTICE, s. 10.

SURROGATES.

Validity given to the judicial acts of surrogates who execute the office of judges in the Courts of Vice-Admiralty abroad, during vacancies in the offices of judges of such Courts, whether occasioned by the death, or resignation, or other removals of the said judges, 56 Geo. 3, c. 82 (passed 25th June, 1816).

TABLE OF FEES.

1. Since the passing of the Act of the Imperial Parliament, 2 Will. 4, c. 51, the establishment of a table of fees for the Vice-Admiralty Court is exclusively in the Privy Council. *The John and Mary—Marshall*, 64.

2. From 1764 to 1780, there are no records in the Registry, or documents, showing what was done in that interval of time in relation to fees. *The London—Dodson*, 148.

3. The Governor and Legislative Council of the old province of Quebec, in 1780, passed a temporary ordinance (20 Geo. 3, c. 3) "for the regulation and establishment of fees," including the fees to be taken in the Vice-Admiralty Court, which Ordinance was continued by several successive temporary Ordinances, the

last of which expired on the 30th of April, 1790, *ib.*

4. The records of the Court contain no information of the fees taken by the officers in the interval between the expiration of this continued Ordinance, and the table of fees established under the authority of the Judge in 1809, and which was generally acted upon by him down to the passing of the 2 Will. 4, c. 51, and the promulgation of the table of fees of the 27th of June, 1832, *ib.*

5. From this period down to the Order in Council of the 20th of November, 1835, this table of fees was acted upon, *ib.*

6. Upon the last-mentioned order for rescinding it being received, the deputy of the then Judge of the Court, who discharged the duties of the office, *ad interim*, during the absence of the judge from the 30th of August, 1833, to the 21st of September, 1836, allowed certain fees to the officers of the Court as a *quantum meruit*, without reference to any particular tariff or table of fees, *ib.*

7. Very soon after entering on the discharge of the duties of Judge of the Court, to which the present incumbent was appointed on the 21st of September, 1836, he *held*, that since the passing of 2 Will. 4, c. 51 (23rd of June, 1832), it was not competent to the Court to award a *quantum meruit* to its officers, the table of fees having been revoked by the Order in Council of the 20th of November, 1835, without any other being made, *ib.* 149.

8. The power given by the 2 Will. 4, c. 51, to his Majesty in Council, from time to time, "to alter" tables of fees established under the authority of that Act, and to make new ones, contains in it the power of rescinding an established table, without substituting another in the place of it, *ib.*

9. Whatever might have been the effect of the Order in Council of the 20th of November, 1835, in reviving a table of fees which had been before legally established, it could not have the effect of giving validity to a table of fees like that of 1809, which at no time had legal existence, *ib.*

10. New table of fees for the officers and practitioners of the Court established by an Order of her Majesty in Council, dated at Buckingham Palace the 2nd of March, 1848, 155.

11. Opinion of the Attorney and Solicitor-General of England, now Lord Campbell and Lord Cranworth, as to the authority of the Judge of the Vice-Admiralty Court at Quebec to establish a table of fees. Note to the case of the *John and Mary*, 69.

TERM PROBATORY.

See PRACTICE, 5.

TORTS.

See ADMIRALTY; ASSAULT; COLLISION; DAMAGE (PERSONAL); JURISDICTION; HARBOUR OF QUEBEC; MASTER OF SHIP; PASSENGER.

TRADE OF THE ST. LAWRENCE.

See PREFATORY NOTICE to these Reports.

TRINITY HOUSE.

1. Where there has been a previous judgment of the Trinity House upon the same cause of damage, the Court has no jurisdiction in cases of pilotage. *The Phoebe—Raltray*, 59.

2. By the by-laws and regulations of the Trinity House of the 28th June, 1805, all ships or vessels, in dark nights, at anchor in the stream opposite the town of Quebec, were required to show a light on the bowsprit end on the flood tide, and at the mizzen peak or ensign staff on the ebb tide. *The Mary Campbell—Simons*, 222.

3. By-laws of Trinity House not abrogated or repealed by desuetude or non-user, *ib.* 223.

4. What is a dark night in the purview of the Trinity House regulations? *The Dahlia—Grossard*, 242.

5. The regulations of the Trinity House require a strict construction in favour of their application, *ib.*

6. By-law of 28th June, 1805, repealed by by-law of 12th April, 1850, and all ships or vessels at anchor in any part of the River St. Lawrence, between Green Island and the western limits of the port of Quebec, during the night, are required to have a distinct light in the fore-rigging twenty feet above the

deck. *The Mary Campbell—Simons* (in note), 225.

7. Duty and authority of harbour-master, and consequences of contravening his directions respecting the berths of vessels. *The New York Packet—Marshead*, 325.

8. Trinity House by-law or regulation of the 12th April, 1850, as to a steamer meeting a sailing vessel going free, and there is danger of collision. *The Inga—Eilertsen*, 339.

TUG AND TOW.

See STEAM TUGS.

UNION-JACK.

None of Her Majesty's subjects to hoist in their vessels the union-jack, or any pendants, &c. usually worn in Her Majesty's ships, and prohibited to be worn by proclamation of 1st of January 1801, under a penalty not exceeding 100*l*. (8 & 9 Vict. c. 87.)

Jurisdiction of the High Court of Admiralty, and of the Vice-Admiralty Courts in such cases, *ib*.

VICE-ADMIRAL.

By letters patent, dated the 19th of March, 1764, General James Murray, then Captain-General and Governor-in-Chief in and over the province of Quebec, was appointed Vice-Admiral, commissary, and deputy in the office of Vice-Admiralty in the said province of Quebec and territories therein depending, and in the maritime parts of the same and thereto

adjoining, with power to take cognisance of and proceed in any matter, cause, or thing, according to the rights, statutes, laws, ordinances, and customs observed in the High Court of Admiralty in England, 370.

For this commission His Majesty introduced into this province all the laws of the English Court of Admiralty in lieu of the French laws and customs by which maritime causes were decided in the time of the French government. (See report prepared by Francis Maseres, Esquire, His Majesty's Attorney-General of the province of Quebec, by order of Guy Carleton, Esquire, the Governor of the province, delivered in to the said Governor on the 27th of February, 1769. Mr. Maseres was afterwards Cursitor Baron of the Court of Exchequer in England.)

List of the several commissions in continuation of the above down to the present time. The powers in all identical, 390.

VICE-ADMIRALTY COURT.

1. The first establishment of the Vice-Admiralty Court in Canada took place immediately after the cession of the country to the Crown of Great Britain, and, as early as 1764, a commission, bearing date the 24th of August of that year, was issued by General Murray, appointing James Potts judge of the Court, which commission was superseded by another issued under the Great Seal of the High Court of Admiralty of England of the 28th of April, 1768;

and the office has been continued by a succession of commissions down to this time. *The London—Dodson*, 147.

2. By 2 Will. 4, c. 51, s. 6, doubts are removed as to the jurisdiction of the Vice-Admiralty Courts in the possessions abroad, with respect to seamen's wages, pilotage, bottomry, damage to a ship by collision, contempt in breach of regulations and instructions relating to His Majesty's service at sea, salvage, and droits of Admiralty, 4.

3. In all cases where a ship or vessel, or the master thereof, shall come within the local limits of any Vice-Admiralty Court, it shall be lawful for any person to commence proceedings in any of the suits hereinbefore mentioned in such Vice-Admiralty Court, *ib.*

4. Notwithstanding the cause of action may have arisen out of the local limits of such Court, and to carry on the same in the same manner as if the cause of action had arisen within the said limits, *ib.*

5. The Court of Vice-Admiralty in the colonies has a concurrent jurisdiction with the Courts of Record there, in the case of forfeitures and penalties incurred by the breach of any Act of the Imperial Parliament relating to the trade and revenues of the British possessions abroad. See The Customs Consolidation Act, 1853 (17 & 18 Vict. c. 107, s. 183).

6. So in the case of any penalties and forfeitures incurred by the breach of the Act of the Legislature of

Canada, consolidating the duties of customs, or by the breach of any other Act relating to the customs or to trade or navigation, concurrent jurisdiction is given to the Court of Vice-Admiralty with the Courts of Record (Provincial stat. 10 & 11 Vict. c. 31, s. 51).

7. So it has jurisdiction in the case of any penalties incurred by the breach of the proclamation of the 1st of January 1801, prohibiting the use of colours worn in Her Majesty's ships (8 & 9 Vict. c. 87).

8. The Court cannot, in cases of pilotage, enforce a judgment of the Trinity House upon the same cause of demand. *The Phoebe—Railray*, 59.

9. The jurisdiction of the Court is not affected by the provisional statute 45 Geo. 3, c. 12, in relation to claims of pilots for extra-pilotage in the nature of salvage for extraordinary services rendered by them. *The Adventure—Peverley*, 101.

10. In a case of wreck in the River St. Lawrence (Rimouski), the Court has jurisdiction of salvage. *The Royal William—Pennel*, 107.

11. The jurisdiction of the Court as to torts depends upon the locality, and is limited to torts committed on the high seas. *The Friends—Duncan*, 112.

12. Torts committed in the harbour of Quebec are not within the jurisdiction of the Court, *ib.*

13. It has jurisdiction of personal torts and wrongs committed on a passenger on the high seas by the

master of the ship, *ib.*, and *The Toronto—Collinson*, 181.

14. In no form can the Court be made ancillary to give effect to proceedings had before a justice of the peace under the Merchant Seamen's Act. *The Scotia—Risk*, 165.

15. Has no jurisdiction with respect to claims of material men for materials furnished to ships owned in Canada. *The Mary Jane—Trescowthick*, 267.

16. The Court has undoubted jurisdiction over causes of possession, and will restore to the owner of a British ship the possession of which he has been unjustly deprived. *The Mary and Dorothy—Teasdale*, 187.

17. By the 240th section of "The Merchant Shipping Act, 1854," power is given to any Court having Admiralty jurisdiction in any of Her Majesty's dominions to remove the master of any ship, being within the jurisdiction of such Court, and to appoint a new master in his stead, in certain cases, 189.

18. Suit for the recovery of wages under the sum of fifty pounds, referred by justices of the peace acting under the authority of the 17 & 18 Vict. c. 104, ss. 188, 189, to be adjudged by the Vice-Admiralty Court. *The Varuna—Davies*, 357.

19. The Court of Vice-Admiralty exercises jurisdiction in the case of a vessel injured by collision in the River St. Lawrence, near the city of Quebec. *The Camillus*, 383. (This was before the passing of the statute of the Imperial Parliament, 2 Will. 4,

c. 51, s. 6, removing doubts as to the jurisdiction.)

VIS MAJOR.

1. If a collision be preceded by a fault, which is its principal or indirect cause, the offending vessel cannot claim exemption from liability on the ground of the damage proceeding from a *vis major*, or inevitable accident. *The Cumberland—Tickle*, 78.

2. Where the collision was the effect of mere accident, or that over-riding necessity which the law designates by the term *vis major*, and without any negligence or fault in any one, the owners of the injured ship must bear their own loss. *The Sarah Ann—Hocker*, 301.

VOYAGE.

In interpreting the Act of Parliament, the words "nature of the voyage" must have such a rational construction, as to answer the main and leading purpose for which they were framed, namely, to give the mariner a fair intimation of the nature of the service in which he was about to engage himself when he signed the ship's articles. *The Varuna—Davies* (in notes), 361.

WAGES.

1. Summary tribunal for the trial of seamen's suits for the recovery of their wages, by complaint to a Justice of the Peace, under the 5 & 6 Will. 4, c. 19, s. 15. *The Agnes—Taylor*, 58.

2. No suit or proceeding for the recovery of wages under the sum of

fifty pounds shall be instituted by or on behalf of any seaman or apprentice in any Court of Admiralty or Vice-Admiralty, or in the Court of Session in Scotland, or in any superior Court of Record in Her Majesty's dominions, unless the owner of the ship is adjudged bankrupt or declared insolvent, or unless the ship is under arrest or is sold by the authority of such Court as aforesaid, or unless any Justices acting under the authority of this Act refer the case to be adjudged by such Court, or unless neither the owner nor master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore (17 & 18 Vict. c. 104, s. 189), 358.

3. Summary tribunal for the trial of seamen's suits for the recovery of their wages, for any amount not exceeding fifty pounds, before any two Justices of the Peace acting in or near to the place at which the service has terminated (*ib.* s. 188).

4. It is a good defence to a suit for wages by a seaman, that he could neither steer, furl, nor reef. *The Venus—Butters*, 92.

5. Discharge and wages demanded on the ground that the vessel was not properly supplied with provisions on the voyage to Quebec, whereby seamen's health had been impaired, and they were unable to return. The circumstances of the case examined, and the master dismissed from the suit, the seamen returning to their duty. *The Recovery—Simkin*, 128.

6. Imprisonment of a seaman by a

stranger for assault does not entitle him to recover wages during the voyage and before its termination. *The General Hewitt—Sellers*, 186.

7. The detention of a vessel during the winter by stranding in the river St. Lawrence, on her voyage to Quebec, where she arrived in the succeeding spring, does not defeat the claim of the seamen to wages during the winter. *The Factor—Price*, 183.

8. Seaman going into hospital for a small hurt not received in the performance of his duty, not entitled to wages after leaving the ship. *The Captain Ross—Morton*, 216.

9. In cases arising out of the abrupt termination of the navigation of the St. Lawrence by ice, and a succession of storms in the end of November, seamen shipped in England on a voyage to Quebec and back, to a port of discharge in the United Kingdom, entitled to have provision made for their subsistence during the winter, or their transportation to an open sea-port on the Atlantic, with the payment of wages up to their arrival at such port. *The Jane—Custance*, 256.

10. The master is not at liberty to discharge the crew in a foreign port, without their consent; and if he do, the maritime law gives the seamen entire wages for the voyage, with the expenses of return, *ib.*

11. Circumstances, as a *semi-naufragium*, will vest in him an authority to do so, upon proper conditions, as by providing and paying for their return passage, and their wages up to the time of their arrival at home, *ib.*

12. It is for the Court to consider what would be most just and reasonable; as, whether the wages are to be continued till the arrival of the seamen in England, or to the nearest open commercial port, say Boston, or until the opening of the navigation of the St. Lawrence, *ib.*

13. Under the peculiar circumstances of this case, wages decreed, including the expense of board and lodging, until the opening of the navigation of the St. Lawrence, *ib.*

14. Three of the promoters shipped on a voyage from Milford to Quebec and back to London, the eight remaining promoters shipped at Quebec for the return voyage; and all had signed articles accordingly. The ship came in ballast to Quebec, and after taking in a cargo sailed from Quebec on her return voyage; and was wrecked in the river St. Lawrence, and abandoned by the master as a total loss. *Held*—1, That the seamen who shipped at Milford were entitled to wages for services on the outward voyage from Milford to Quebec, and one half the period that the vessel remained at Quebec, notwithstanding that the outward voyage was made in ballast; 2, That the seamen who shipped at Quebec having abandoned, were not entitled to claim wages; 3, In cases of wreck the claim of the seamen upon the parts saved is a claim for salvage, and the *quantum* regulated by the amount which would have been due for wages. *The Isabella*—*Dixon*, 281.

15. But see "The Merchant Ship-

ping Act, 1854" (17 & 18 Vict. c. 104, s. 183), which came into operation on the 1st of May, 1855, and by which wages are no longer to be dependent on the earning of freight, *ib.* (in note), 288.

WARRANT.

See PRACTICE, 9.

WILKES'S CASE.

Wilkes's case cited. *The Dumfries-shire*—*O'Brien*, 246.

WITNESS.

1. As to the competency of the master as a witness in suits with seamen. *The Sophia*—*Easton*, 96.

2. Master admitted as a witness in a case of pilotage, *ib.*

3. While the master exercises the control of the navigation of the ship, and before delegating his authority to the pilot, as the liability is with him, he is an incompetent witness in collision cases. *The Lord John Russell*—*Young*, 194.

4. While the pilot has the control of the navigation of the ship, as he is substituted in the place of the master, —and the master has ceased, therefore, to be liable as such,—the liability for default, negligence, or unskillfulness, comes to rest upon the pilot, and he is not a competent witness, *ib.*

5. The question resolves itself into a question of negligence, or want of skill and care in those persons who at the precise time had the control

and direction of the vessels. *The Mary Campbell—Simons*, 224.

6. Defendant's bail is an incompetent witness. *Sophia—Weatherall*, 219.

See EXCEPTIVE ALLEGATION.

WRECK.

See WAGES.

See SALVAGE, 8, 9.

In the case of the barque *Flora—Wilson* (27th October, 1832), Judge

Kerr allowed salvage to the chief and second mates, and carpenter, for their meritorious services, equal to one-third of the gross proceeds arising from the sale of the articles saved from the wreck (in notes), 255.

Compensation decreed to seamen out of the proceeds of the materials saved from the wreck by their exertions. *The Sillery—Hunter*, 182.

THE END.

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